

91-775

FILED

JUN 25 1991

OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GEORGE KLEINMANN,

Petitioner,

v.

MARIO CUOMO, AS GOVERNOR OF THE
STATE OF NEW YORK, THE STATE OF NEW
YORK AND ARTHUR Y. WEBB, AS
COMMISSIONER OF THE NEW YORK STATE
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX - VOLUME 2

MADELINE SHEILA GALVIN
Attorney for Petitioner
217 Delaware Avenue
Delmar, New York 12054
(518)439-7734

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EXECUTIVE DEPARTMENT
DIVISION OF THE BUDGET
STATE CAPITOL
ALBANY, 12224

HOWARD F. MILLER
DIRECTOR OF THE BUDGET
(Letterhead)

NOTICE OF ABOLISHED POSITIONS
(FORM BD-98)

OMRDD Personnel Office
OMRDD Finance Office
Dept. of Audit and Control, Payroll Audit
Dept. of Civil Service, Personnel Transactions
Dept. of Civil Service, Classification & Comp.

THIS IS TO NOTIFY YOU THAT THE FOLLOWING
POSITIONS ARE ABOLISHED AS OF THE EFFECTIVE DATE
NOTED BELOW. THE AFFECTED DEPARTMENT OR AGENCY
COULD TAKE IMMEDIATE STEPS TO INSURE THERE ARE
NO PAYMENTS OR ENCUMBRANCES AGAINST THESE
ABOLISHED POSITIONS AS OF THE EFFECTIVE DATE.

Dept: OMRDD Code: 51000

<u>Item #</u>	<u>Title</u>	<u>SG</u>
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DIRECTOR OF THE BUDGET:

_____ DATE _____

cc: Budget Division Central Files

OFFICIAL USE ONLY - DO NOT WRITE	
SENDER INSTRUCTIONS	
From your name, address, and ZIP Code in the space below:	
<ul style="list-style-type: none">• Complete circles 1, 2, and 3 on the reverse.• Attach to front of circle 2 three postage stamps or to back of circle 2.• Enclose article "Return Receipt Requested"	
Minimum: 10¢ postage	
RETURN TO	
	
John Ryan, Field Representative (Name of Sender) Public Employees Federation 159 Wolf Rd. (Street or P.O. Box) Albany, NY 12205 (City, State, and ZIP Code)	



U.S. MAIL

1. The following errors in reference (Per 1 and 1) a. Name in column and date delivery..... <input type="checkbox"/> Name in column, date and address of delivery..... <input type="checkbox"/> RESTRICTED DELIVERY Name in column and date delivery..... <input type="checkbox"/> RESTRICTED DELIVERY Name in column, date, and address of delivery.....		2. ADDRESS ASSIGNED TO Thomas Hartnett, Dir., Gov. Off. Emp. Rel., Agency Bldg 2, Empire State Plaza ALBANY, N.Y. 12242 REFERENCE NO. 34343 REFERENCE NO. 34343 REFERENCE NO. 34343	
3. ADDRESS ASSIGNED TO Thomas Hartnett, Dir., Gov. Off. Emp. Rel., Agency Bldg 2, Empire State Plaza ALBANY, N.Y. 12242 REFERENCE NO. 34343 REFERENCE NO. 34343 REFERENCE NO. 34343		4. ADDRESS ASSIGNED TO Thomas Hartnett, Dir., Gov. Off. Emp. Rel., Agency Bldg 2, Empire State Plaza ALBANY, N.Y. 12242 REFERENCE NO. 34343 REFERENCE NO. 34343 REFERENCE NO. 34343	
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[illegible]

(OMRDD Letterhead)

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

Zygmund L. Slezak
Devane
Commissioner
Management

Charles M.
Director
Human Resources

CERTIFIED MAIL --- RRR

April-4, 1983

Mr. George Kleinman
749 New Scotland Avenue
Albany, New York 12208

Dear Mr. Kleinmann:

On March 18, 1983, a Second Step Review Meeting was conducted at 44 Holland Avenue on the contract grievance you have filed alleging violation of the preamble to the Bill of Rights, Article 2.2(e), Article 5, Article 6.3, and Article 36.2 of the Professional, Scientific, and Technical Services Unit Agreement.

STATEMENT OF FACTS

In June of 1982, a portion of The Division of Quality Assurance was moved from 44 Holland Avenue to a location on Russell Road. You were originally scheduled to move with that group. Because you saw your relationship with your immediate supervisor as less than satisfactory and the Russell Road location would cause some personal hardship, you sought to make alternative arrangements. With the assistance of the Personnel Office, an exchange of assignment with another employee was arranged. This arrangement was confirmed in a memorandum to you from Deputy Commissioner Norris dated June 28, 1982. About six months later, in a memorandum to you dated January 3, 1983, Mr. Cuite, the new Deputy Commissioner for Quality

Control, ordered the original reassignment to take place.

POSITION OF THE GRIEVANT

It is your position that the preamble of the Bill of Rights has been violated because your individual rights have not been maintained.

You contend that Article 2.2(e) has been violated because there was no "amicable discussion" before Mr. Cuite ordered your reassignment to go forward.

You believe that Article 5 has been violated by your immediate supervisor promising five different promotions at different times with none of these promises being fulfilled.

You indicated that Article 6.3 has been violated because your rights as an employee under the law have been

violated. You feel that the inclusion of your position in those to be abolished under the current layoff is a reprisal for exercising your rights under the grievance procedure.

You allege that Article 36.2 has been violated because, you contend, you have been discriminated against because of your age (57).

REMEDY SOUGHT

You seek to have your layoff notice rescinded and to remain at 44 Holland Avenue.

POSITION OF MANAGEMENT

The decision to reassign you and the decision to abolish your position were separate management decisions that were

made based upon the best utilization of the manpower resources available to the Division. Such decisions are a management right guaranteed by Article 5 of the agreement.

DISCUSSION

Article 9 of the Bill of Rights states:

"9. Disagreements arising as to the interpretation or application of the Bill of Rights shall not be specifically addressed under this Bill of Rights but must be grieved under the appropriate Article contained in the Agreement."

In light of the above language in the Bill of Rights itself, the Bill of Rights is not grievable. This aspect of your grievance, therefore, is denied as not grievable.

Article 2 of the agreement is the Statement of Policy and the Purpose of the agreement.

Article 2.2 states that one of the purposes of the agreement is:

"(e) To provide a basis for the adjustment of matters of mutual interest by means of amicable discussion".

That remains a purpose of the Collective Bargaining Agreement and has not been modified or abridged. Fulfillment of that goal can be found in both grievance procedures in which this matter is currently being dealt with. It was never intended for that contract language to require each and every management decision to be discussed with the union before implementation. In light of this, we must conclude that this contract

article has not been violated. This aspect of your grievance is denied on its merits.

Article 6.3 is part of Article 5, the "No Strikes" Article. You presented no evidence that the rights, remedies, or duties of PEF or employees under the State Law have been limited. Indeed, a strike was never even discussed. This contract article has not been violated. This aspect of your grievance, therefore is denied on its merits. In addition, any question of the appropriateness of your impending layoff is not properly before us in this grievance since you were notified of impending layoff long after this grievance was filed.

Article 36.2 states that "the State

agrees to continue its established policy against all form of illegal discrimination..." The State has not in any manner changed or discontinued its policy in this regard. The State's established policy continues to be against all forms of illegal discrimination.

The purpose of Article 36.2 is not to review individual claims of discrimination. The question of whether or not an individual has been subjected to a discriminatory act is not a matter for review by the grievance procedure. There ar other appropriate avenues of redress, such as the Affirmative Action Officer and the New York State Division of Human Rights. The purpose of Article 36.2 is to provide a protection to the

Union to assure that the State will not attempt to discontinue its established policy against all forms of illegal discrimination.

Inasmuch as the State has done that which it committed itself to do in Article 36.2, ie. has continued its policy against all forms of illegal discrimination, there has been no violation of Article 36.2. Even if this were not the case, you presented no evidence at all to demonstrate discrimination due to age. This aspect of your grievance is denied on its merits.

DECISION

Your grievance is denied in all of its aspects.

If this decision is found to be unsatisfactory, an appeal may be filed by PEF, through its President or his designee, with the Director of the Governor's Office of Employee Relations within 15 working days of the receipt of this decision. Any such appeal should be filed with:

Thomas Hartnett, Director
Governor's Office of Employee
Relations
Agency Building #2
Empire State Plaza
Albany, NY 12223

and shall include a copy of the grievance, a copy of all prior decisions and appeals, and a short plain written statement of the reasons for disagreement with this decision.

Very truly yours,

Sheldon S. Kramer
Director of Employee Relations

SSK/evs

cc: R. Rockwell
J. Sano
B. Babcock

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ROUTING SLIP

NEW YORK STATE
BUREAU OF MOTOR VEHICLE REGISTRATION AND
SALES TAX ADMINISTRATION

NOTE: COURTESY DELIVERY NOT COMPLETED BY ADDRESSEE WILL NOT BE DELIVERED

TO	FIRST NAME <i>George</i>	AT	LAST NAME <i>Kleinman</i>
DATE TIME			TELEPHONE (H R) (WORK OR HOME)
OR			
FACILITY NAME (WORK OR HOME)			

FROM	FIRST NAME	AT	LAST NAME
DATE TIME			TELEPHONE (H R) (WORK OR HOME)

<input type="checkbox"/> AS REQUESTED <input type="checkbox"/> FOR YOUR COMMENTS <input type="checkbox"/> FOR YOUR APPROVAL <input type="checkbox"/> TAKE APPROPRIATE ACTION <input type="checkbox"/> CALL ME <input type="checkbox"/> SEE ME	DATE <u>4/6/83</u> <input type="checkbox"/> FOR YOUR INFORMATION <input type="checkbox"/> NOTE & RETURN <input type="checkbox"/> NOTE & FILE <input type="checkbox"/> FOR YOUR SIGNATURE <input type="checkbox"/> _____
<p><i>This should have been attached to the 2nd slip I believe you picked up today.</i></p>	

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BEST AVAILABLE COPY

STATE/PEF GRIEVANCE FORM
PROFESSIONAL SCIENTIFIC AND TECH SERVICES UNIT
(All grievances, decisions, and appeals
must be served personally or by
certified mail, return receipt req.).
TO BE COMPLETED BY GRIEVANT OR HIS
REPRESENTATIVE:

Name: George Kleinmann Title: Administrative
Assist.

Department: OMRDD

Work Location: 44 Holland Avenue

Supervisor: Thomas Cuite

Type of Grievance:

— Contract Grievance
— Provision of State/PEF Agreement
alleged to have been violated:

X Non-Contract Grievance
(May be appealed only through Step 3)

STEP 1

(Note: Step 1 grievance must be submitted not
more than 30 days after the date the act or
omission giving rise to the grievance occurred.)

Date of Occurrence: January 3, 1983

Statement of Facts: (Use additional sheets if
required) Was reassigned with only 1 full day's
notice to a previous supervisor with whom I have
had an extremely poor experience, and to a
location which is a (over)

Remedy Sought: Agency to honor its commitment

and to keep grievant at 44 Holland Avenue

Date Submitted: January 4, 1983

Aggrieved Employee: /s/ George Kleinmann

CHECK TO MAKE SURE ALL REQUIRED INFORMATION HAS
BEEN PROVIDED AND GIVE THIS FORM TO YOUR
FACILITY OR INSTITUTION HEAD OR DESIGNEE.

1st Step Decision

Date Grievance Received: _____

Determination Attached.

Date Decision Issued: _____

* Note: Facility or Institution head or
designated representative shall meet with the
employee or PEF and shall issue a short, plain
written statement of reason for his decision to
the employee or PEF not later than twenty (20)
working days following the receipt of
grievance.

STEP 2 APPEAL

(NOTE: To be submitted with a copy of the Step
1 decision to the agency head or his

representative designated to receive such appeals within (10) working days* of receipt of Step 1 decision or date Step 1 decision ws due, whichever is earlier.)

The decision at Step 1 of the grievance described above is unsatisfactory.

Reasons for disagreement with Step 1 Decision:
(1) Step one decision not submitted timely; contractual violation. (2) I have right to assume non-compliance to my demand. (3) PLEASE REFER TO ATTACHMENT WHICH IS MADE PART OF THIS STEP 2 APPEAL FORM

Date Submitted: February 4, 1983

Aggrieved Employee: /s/ George Kleinmann

CONTINUATION OF STATEMENT OF FACTS AS CONTAINED
IN STEP 1

...hardship for me, and a location that I was promised I would not have to go to, as per an agreement with Mr. Norris, Mr. Contello and Mr. Rockwell based on letter of June 28, 1982 from Mr. Norris (attached). The abruptness, unfairness and lack of explanation is an additional insult to human dignity.

(OMRDD Letterhead)

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

Zygmund L. Slezak Charles M. Devane
Commissioner Director
 Human Resources Management

Date: March 10, 1983

Re: PEF Non Contract Grievance

Mr. George Kleinmann
749 New Scotland Avenue
Albany, New York 12208

Dear Mr. Kleinmann:

This will acknowledge receipt of the
above referenced grievance. In
accordance with the grievance procedure
you are now entitled to a review of your
grievance before a representative of the
Commissioner.

You grievance review meeting is scheduled
to be held:

At: 44 Holland Avenue, 3rd Floor
Commissioner's Conference Room

Date: March 18, 1983

Hour: 12:00

Before: Robert G. Babcock

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In the event that unforeseen circumstances make it impossible to attend the meeting as scheduled, you and/or your representative are to request a postponement no less than 72 hours before the time and date set forth above. Unless there is mutual agreement to adjourn this review, it is expected that all parties will be ready to proceed on the date indicated.

Very truly yours,

Sheldon S. Kramer
Director of Employee Relations

nls

cc: Facility Personnel Director
Union Representative(s)
or
Employee's Attorney
Grievance File

OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

INTRADEPARTMENTAL CORRESPONDENCE

TO: Mr. Kleinmann

FROM: Mr. Norris

DATE: June 28, 1982

SUBJECT: Reassignment

ADDITIONAL COPIES TO: Mr. Radzynski

It is my understanding that you have requested a reassignment. I have discussed your request with Mr. Radzynski who has proposed that you be assigned to the functions now being performed by Mr. Niles. Mr. Niles will be reassigned to perform those functions you are now performing.

I have no objection to this proposal and presuming the conditions are satisfactory to you, I suggest you work out a transition with Mr. Radzynski and

Mr. Niles.

If there are any problems, please
let me know.

(Date Stamped
Received July 1, 1982)

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Attachment February 4, 1983

Events warrant change of grievance type
to Contract
Grievance, Contract Articles Cited.

1. Article 2.2.e.

Supervisor gave no explanation for transfer on January 3 or again on January 4, 1983; made no effort to discuss matter amicably; sat rigid and unresponsive during both meetings. Agency representatives have made no attempts at settlement; their numerous phone calls to home of grievant related entirely to physical examinations which they arranged by mail then canceled by phone. Supervisor's latest written order of January 27, 1983 is not compliant with request of grievant, and would result in further

embarrassment to grievant and co-workers.

2. Article 5.

The prerogative of an individual supervisor in deploying the work force cannot include overriding commitments made by a member of the agency management team senior to himself only shortly before the event grieved. Grievant's remaining at 44 Holland Avenue after departure of his former unit was the product of months of worrisome, unremitting effort and negotiation. Grievant requested assistance in transferring in January 1982. In February Mr. Kevin Travis, Deputy Commissioner of Quality Assurance, agreed to release item at the suggestion of Mr.

Raymond Rockwell, Director of Personnel, who then promised grievant that he would not have to leave 44 Holland Avenue. In June 1982 at suggestion of Mr. Robert Norris, First Deputy Commissioner, Grievant agreed to switch duties with another staff member making approximately twice the salary, in order to stay at 44 Holland. This arrangement once agreed to by all parties concerned, was approved by Mr. Joseph Costello and Mr. Raymond Rockwell, at a meeting with grievant on July 12, 1982. Grievant had worked under this arrangement for almost six months when it was abruptly overridden. Grievant demands that his rights in these circumstances be established through

the full grievance process including hearing if necessary.

3. Article 6.3

Nothing in this contract under which grievance is made, precludes grievant from pursuing any and all other options available under this and other laws. Proceedings in this grievance should enhance and correlate with any other actions.

4. Article 36.

In view of the intolerable oppression and discrimination evidenced by the transfer order of January 3, 1983, and of similar events occurring earlier, grievant retains option of filing complaints with appropriate state and federal offices; instant proceedings

including hearing if necessary
should conduce to this process.

For the above and other reasons I am
requesting that the type of grievance be
changed to Contract, and the matter
proceed in orderly stages through the
hearing if not settled by arrangement
allowing grievant to remain at 44 Holland
Avenue.

/s/ GEORGE KLEINMANN

Dated: Feb 4, 1983

STATE/PEF GRIEVANCE FORM
PROFESSIONAL SCIENTIFIC AND TECH SERVICES UNIT
(All grievances, decisions, and appeals
must be served personally or by
certified mail, return receipt req.).
TO BE COMPLETED BY GRIEVANT OR HIS
REPRESENTATIVE

Name: George Kleinmann

Title: Administrative Assistant

Department or Agency: OMRDD

Work Location: Albany

Supervisor: Thomas J. Cuite, Jr.

Type of Grievance:

X Contract Grievance
Provision of State/PEF Agreement
alleged to have been violated:

 Non-Contract Grievance

STEP 1

(NOTE: Step 1 grievance must be submitted not
more than 30 days after the date the act or
omission giving rise to the grievance occurred.)

Date of Occurrence: March 11, 1983

Statement of Facts: I was laid off in
retaliation for my having filed grievance.
Layoff was used as a solution to grievance.
Original grievance 1-4/83 2 pgs 3-23-83
attached.

Remedy Sought: Agency to honor its commitment to keep grievant at 44 Holland Ave at same salary grade bypassing layoff in view of medical testimony and facts on attachments

Date Submitted: March 23, 1983

Aggrieved Employee: /s/ George Kleinmann

1st Step Decision

Date Grievance Received: _____

Determination Attached.

Date Decision Issued: _____
Facility or Institutional Level Rep. _____

*NOTE: Facility or Institution head or designated representative shall meet with the employee or PEF and shall issue a short, plain written statement of reason for his decision to the employee or PEF not later than (20) working days following the receipt of grievance.

STEP 2 - APPEAL

(NOTE: To be submitted with a copy of the Step 1 decision to the agency head or his representative designated to receive such appeals within 10 working days* of receipt of

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Step 1 decision or date Step 1 decision was due, whichever is earlier.)

The decision at Step 1 of the grievance described above is unsatisfactory.

Reasons for disagreement with Step 1 Decision:

See attachments I, II, III, IV, V. I - When layoff was finally conducted on May 4, 1983, I was one of only two persons out of entire layoff unit to be let go. the other 27 of the originally scheduled group of 29 to be laid off, were saved.

Date Submitted: May 26, 1983

Aggrieved Employee: /s/ George Kleinmann

(OMRDD Letterhead)

STATE OF NEW YORK
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES

Zygmund L. Slezak
Devane
Commissioner

Charles M.
Director
Human Resources

CERTIFIED MAIL---RRR

April 20, 1983

Mr. George Kleinmann
749 New Scotland Avenue
Albany, NY 12208

Dear Mr. Kleinmann:

On March 18, 1983, a Second Step Review Meeting was conducted at 44 Holland Avenue on the non-contract grievance you originally filed on January 4, 1983, alleging unfair treatment in a reassignment.

STATEMENT OF FACTS

In June of 1982, a portion of The Division of Quality Assurance was moved from 44 Holland Avenue to a location on Russell Road. You were originally scheduled to move with that group. Because you saw your relationship with your immediate supervisor as less than satisfactory and the Russell Road location would cause some personal hardship, you sought to make alternative arrangements. With the assistance of the Personnel Office, an exchange of assignment with another employee was arranged. This arrangement was confirmed in a memorandum to you from Deputy Commissioner Norris dated June 28, 1982. About six months later, in a memorandum to you dated January 3, 1983, Mr. Cuite

the new Deputy Commissioner for Quality Control, ordered the original reassignment to take place.

DISCUSSION .

At the meeting, it became clear that additional information was needed from Messrs. Cuite and Norris regarding your reassignment. It was mutually agreed to hold this matter in abeyance for two weeks to permit time for the management representative to produce this information and for the union to respond to it.

During this hiatus, certain changes in the geographic location of programs took place. This removed the major impediment to your acceptance of your reassignment.

Indeed, subsequently, you have reported for duty at the Russell Road Location.

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DECISION

Your grievance is rendered moot.

If this decision is found to be unsatisfactory, an appeal may be filed by PEF through its President or his designee, with the Director of the Governor's Office of Employee Relations within 15 working days of the receipt of this decision. Any such appeal should be filed with:

Thomas Hartnett, Director
Governor's Office of Employee
Relations
Agency Building #2
Empire State Plaza
Albany, New York 12223

and shall include a copy of the grievance, a copy of all prior decisions and appeals, and a short plain written statement of the reasons for disagreement with this decision.

Very truly yours,

Sheldon S. Kramer
Director of Employee Relations

SSK /evs

cc: R. Rockwell
J. Sano
R. Babcock

STATE/PEF GRIEVANCE FORM
PROFESSIONAL, SCIENTIFIC AND TECHNICAL
SERVICES UNIT

TO BE COMPLETED BY GRIEVANT OR HIS
REPRESENTATIVE:

Name: George Kleinmann

Title: Administrative Asst

Department or Agency: OMRDD

Work Location: 44 Holland Ave., Albany

Supervisor: Thomas Cuite

Type of Grievance:

 Contract Grievance
 Provision of State/PEF Agreement
 alleged to have been violated:

Article:

Subsection:

 X Non-Contract Grievance (May be
appealed only through Step Three)

STEP 1

(NOTE: Step 1 grievance must be submitted
not more than thirty (30) days after the
date the act or omission giving rise to

the grievance occurred.)

Date of Occurrence: January 3, 1983

Statement of Facts: Was reassigned with only 1 full day's notice, to a previous supervisor with whom I have had an extremely poor experience, and to a location which is a (over)

Remedy Sought: Agency to honor its commitment and to keep grievant at 44 Holland Avenue, Albany, N.Y.

Date Submitted: January 4, 1983

Aggrieved Employee: /s/ George Kleinmann

CHECK TO MAKE SURE ALL REQUIRED
INFORMATION HAS BEEN PROVIDED AND GIVE
THIS FORM TO YOUR FACILITY OR INSTITUTION
HEAD OR DESIGNEE.

1st Step Decision

Date Grievance
Received: _____

Determination Attached

Date Decision
Issued: _____

Facility or Institutional Level
Rep. _____

*NOTE: Facility or Institution head or designated representative shall meet with the employee or PEF and shall issue a short, plain written statement of reason for his decision to the employee or PEF not later than twenty (20) working days following the receipt of grievance.

STEP 2-APPEAL

(NOTE: To be submitted with a copy of the Step 1 decision to the agency head or his representative designated to receive such appeals within ten (10) working days* of receipt of Step 1 decision or date Step 1 decision was due, whichever is earlier.)

The decision at Step 1 of the grievance described above is unsatisfactory.

Reasons for disagreement with Step 1 decision: (1) Step One Decision not submitted timely; contractual violation. (2) I have right to assume non-compliance to my demand. (3) PLEASE REFER TO ATTACHMENT WHICH IS MADE PART OF THIS STEP 2 APPEAL FORM.

Date Submitted: February 4, 1983

Aggrieved Employee: /s/ George Kleinmann

STATE/PEF GRIEVANCE FORM

2nd STEP DECISION

Date Received: _____

Determination Attached

Date Decision Issued _____

Reviewer: _____

*NOTE: The agency or department head or his designee shall meet with the employee or PEF for a review of the grievance and shall issue a short written statement of reasons for his decision to the employee or PEF, as appropriate, no later than 20 working days following receipt of the Step 1 Appeal.

STEP 3 - APPEAL

(NOTE: Appeals to Step 3 may be submitted only by the President of PEF or his authorized designee, and must be submitted within 15 working days* of the grievant's receipt of the Step 2 decision.)

The decision at Step 2 of the grievance described is unsatisfactory.

Reasons for disagreement with Step 2
Decision _____

Date Submitted: _____

Aggrieved Employee: _____

Authorized Signature: _____

*NOTE: PEF must file this appeal within fifteen (15) days of receipt of Step 2 Decision or date Step 2 Decision was due, whichever is earlier, together with the grievance and the decisions at Step 1 and 2 with the Governor's Office of Employee Relations, Agency Building #2, 12th Floor, Empire State Plaza, Albany, NY, 12223.

3RD STEP DECISION

Case Number: _____
Date Received by the Governor's Office of
Employee
Relations: _____

Determination Attached

Date Decision
Issued: _____

Director of the Governor's Office of
Employee Relations or
Designee: _____

*NOTE: The Director of the Governor's
Office of Employee Relations, or his
designee, shall issue a short, plain
written statement of reasons for his

1
decision within 15 working days after receipt of the appeal.

STEP 4 - APPEAL

(NOTE: Appeals to Arbitration may be submitted only by the President of PEF or his designee, and must be submitted to the Governor's Office of Employee Relations within 15 working days of receipt of the Step 3 decision.)

The Public Employees Federation hereby demands ARBITRATION.

Date Submitted: _____
Authorized Signature _____

*In the case of a department or agency which normally operates on a 7-day a week basis, the reference to 10 working days shall mean 14 calendar days and 15 working days shall mean 21 calendar days and 20 working days shall mean 28 calendar days. All time limits contained in this Article may be extended by mutual agreement. Extensions shall be confirmed in writing by the party requesting them.

This page of the appendix contains a proof of receipt of certified mail. It cannot be reproduced here without use of photoreduction.

State of New York
Office of Mental Retardation and
Developmental Disabilities
44 Holland Avenue
Albany, New York 12229

CERTIFIED MAIL--RRR

Mr. George Kleinmann
749 New Scotland Avenue
Albany, NY 12208

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

CLAIM CHECK
NO.
411468

☐ HOLD

DATE

4/22/83
FIRST NOTICE

2ND NOTICE

RETURN

Detached from
PS Form 3848-A
May 1979

A-175

BEST AVAILABLE COPY

GOVERNORS OFFICE OF EMPLOYEE RELATIONS
File No. 83-05-598

(Stamped received 6/7/84 OMRDD
Personnel Office)

- - - - -
IN THE MATTER OF THE ARBITRATION

-between-

ARBITRATORS
OPINION &
AWARD

Public Employees Federation, AFL-CIO

-and-

(Stamped
received
5/30/84
Employee
Relations)

STATE OF NEW YORK (OFFICE OF MENTAL
RETARDATION AND DEVELOPMENTAL
DISABILITIES - CENTRAL OFFICE)

RF: George Kleinmann
- - - - -

APPEARANCES

For the Public Employees Federation, AFL-CIO: John Ryan, Field Representative; Linda Stanczik, Director of Field Services; George Kleinman, Grievant; Richard Burstein, Roemer & Featherstonhaugh, Counsel to Grievant; Ted Ricket, Co-Leader; Miles Cavanaugh, Field Representative

For the State of New York (Office of Mental Retardation and Developmental Disabilities - Central Office):
Susan G. Whiteley, Assistant Counsel;
Raymond E. Rockwell, Assistant Director of Personnel; Robert G. Bentley, Deputy Director of Employee Relations; Sheldon S. Kramer, Director of Employee Relations; Robert J. Foody, Assistant Counsel; Sue R. VanBuren, Senior Personnel Administrator; Bill Strait

Before: Edward Levin, Arbitrator

Issue: Did the State of New-York (Office of Mental Retardation and Developmental Disabilities) violate Article 36.2 of the 1982-85 Agreement between the State and PEF on March 11, 1983?

If so, what, consistent with the Agreement, shall the remedy be?

CONTRACT LANGUAGE

ARTICLE 36.2

The State agrees to continue its established policy against all forms of illegal discrimination with regard to race, creed, color, national origin, sex, age, or handicap, or the proper exercise

by an employee of the rights guaranteed by the Public Employees Fair Employment Act.

UNION POSITION

The grievance involves George Kleinman, a member of the bargaining unit, age 57, with twenty years of satisfactory service with the State who filed a grievance protesting his reassignment on January 3, 1983 to another building because of its adverse impact on his health. At the time he filed the grievance Mr. Kleinman was employed by the State in the Office of Mental Retardation and Developmental Disabilities (OMRDD) as an Administrative Assistant, Grade 18. After filing the grievance Mr. Kleinman went on sick leave

to avoid the damaging impact that the reassignment might have. On January 14, 1983, Mr. Kleinman received a letter from Raymond E. Rockwell, Assistant Director of Personnel, directing him to report to the Employee's Health Service for an examination. After some scheduling problems were ironed out, Mr. Kleinman was examined by Dr. Hargraves on February 24, 1983 and was told that he would have to have another examination with a consulting physician and was sent to Dr. Steinhart on March 9, 1983. In a letter dated March 23, 1983, Dr. Hargrove wrote Mr. Rockwell advising him that both doctors advised that Mr. Kleinman not be placed in his current work assignment.

On March 11, 1983, while Mr. Kleinman was still on sick leave Mr. Sheldon Krammer, Director of Labor

Relations for OMRDD, called Mr. Kleinman to inform him that there would be a grievance hearing on March 18, 1983 and that he would receive a notice to that effect in the mail. That notice never arrived but the following day Mr. Kleinman received a lay-off notice from Mr. Zygmund Slezak, the Commissioner.

The Union contends that of the 29 PS&T unit members who received lay-off notices on that day, two worked for the Albany Central Office. Of those two, one was Mr. Kleinman and the other was someone who refused to bump or retreat to a lower grade. The Union points out that most of the other employees in the PS&T unit who were layed-off were maintained in positions by methods that were available to the OMRDD with respect to

Mr. Kleinman. In contrast, Ms. Ronnie Raines, an MR Program Planner I, Grade 18 who was a Provisional Employee scheduled for lay-off on May 4, 1983, was retained while Mr. Kleinman was not. The Union believes that this serves as proof that the lay-off was used as a pretext to get rid of Mr. Kleinman because of his age and in retaliation for his opposition to reassignment. The Union reasons that if they were not intending to discriminate against Mr. Kleinman, why did they retain a "provisional employee and lay off a twenty year employee with veteran status at approximately the same employment and salary level?

The Union believes that it has established a prima facie case of discrimination having shown that Mr.

Kleinman, a Protected Class employee, age 57, was laid off in violation of Civil Service Law while a younger provisional employee in a job and salary level similar to his was retained. The Union maintains that his qualifications to take another job is moot since he should not have been forced out of his original position while a younger provisional was retained.

The Union points out that Mr. Kleinman is now on the State's payroll earning \$5,140, less than he received when he was laid-off. In addition, his travail has effected his health. The Union asks that the grievance be therefore granted and the grievant be made whole to the date of his lay-off.

STATE POSITION

The State points out that it made many accommodations to Mr. Kleinman's needs during the period between February, 1982 and January, 1983, when Mr. Kleinman was transferred to another location that was unacceptable to him. For a period of three months after being notified of his transfer he absented himself from work claiming that working with his new supervisor would make him ill. On January 14, 1983, Mr. Kleinman was notified that because of his absence from work and his failure to provide a doctor's note, a medical examination was arranged with the Employee Health Service (EHS) to determine his health status and work capabilities. Although Mr. Kleinman reported for his EHS medical examination,

he did not complete it and stated that he would consult his own physician before filling out EHS forms. Subsequently, he brought in a note from his own physician which the State found non-specific and inadequate. However, because a new work arrangement that might be satisfactory to Mr. Kleinman was being worked out, a new physical examination was not rescheduled. On January 27, 1983 the grievant was informed of a new arrangement that addressed his complaint about working with a specific supervisor, but he still did not report to work and continued on sick leave. On February 24, 1983 he was once again required to report to EHS for an examination.

In the meantime, because of a budgetary emergency, it became necessary

for the OMRDD to reduce its work force and plans were developed to accomplish this goal in a way that would not impair the functions of the agency's bureaus. One of the targeted positions was that of Administrative Assistant, Grade 18. As a result all individuals in that position, including the grievant, were notified on March 11, 1983 of the scheduled lay-offs unless they exercised bumping or retreatment rights.

On March 23, the EHS issued a report stating that it would not be appropriate to place Mr. Kleinman in his current work assignment. This report was issued by EHS without knowledge of the events that transpired from the time between Mr. Kleinman's medical examination and their report.

After the March notice of lay-off, Mr. Kleinman met with Mr. Rockwell and discussed his retreat option consisting of a position as a Grade 14, Computer Programmer, a job he previously held. Mr. Kleinman accepted the option but subsequently notified his prospective supervisor that he would not accept the position. According to the State he was asked to make his declination formal, but he never did so and the position was subsequently filled by another laid-off employee.

On March 30, 1983, in response to a request by the grievant, the Civil Service Department informed him that the only position available to him based on his retreatment, bumping or lateral rights was the Grade 14 Computer Program

position. However, on April 1, 1983 a letter went out to Mr. Kleinman informing him that the layoff was postponed until the close of business on May 4, 1982. On April 7, 1983, Mr. Kleinman sent a letter to Mr. Rockwell advising him that he was claiming the Computer Programmer job that was offered to him earlier, but was informed in a letter dated April 12, 1983 that since he did not respond in a timely way to the offer of that position, the option was foreclosed and was no longer available to him. On May 4, 1983 Mr. Kleinman was laid off as previously informed and shortly afterwards was rehired as a Purchasing Agent with the State Office of General Services.

The State denies any allegation of illegal age discrimination. The Federal

test for age discrimination derived from various court cases requires that the plaintiff must show that (1) he is within the protected age group and that he had been adversely affected - discharged or demoted by the employer's decision; (2) show that he was qualified to assume another position at the time of discharge or demotion; and (3) produce evidence, circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. With respect to the third test, while the court requires an employer not to discriminate, it does not require special treatment of the "protected" employee. Therefore the plaintiff is required to show that the employer did

not treat age neutrally and lead the fact-finder to conclude that the employer either consciously refused to consider retaining or relocating a plaintiff because of age, or regarded age as a negative factor in such consideration.

While Mr. Kleinman has shown that he meets the criteria for the protected age group, he has failed to show that he qualified for any of the positions that he applied for or produce evidence, circumstantial or direct, that OMRDD intended to discriminate against him because of age. The only attempt to show discrimination was the claim of disparate treatment regarding a Ms. Bonnie Raines, a Provisional Programmer at his level who was not laid off. Besides not producing any evidence concerning Ms. Raines age,

the OMRDD showed that this employee held a different job title than Mr. Kleinman, was in another program which was funded from a different source, and was not subject to displacement. Thus the Union failed to present a prima facie case of discrimination nor did it show any change of established State policy in this regard. Therefore, there is no proof that Article 36, Section 2 of the Agreement was violated with regard to its prohibition concerning discrimination.

The State maintains that in order to prove that Mr. Kleinman was discriminated against because of union activity, the burden is on him to show that but for the protected activity of filing a grievance he would not have been laid off. The State points out that the grievant never

produced a copy of the grievance that he alleged he filed on or about January 3, 1984 or the exact nature of the grievance. Nor did he show a connection between the alleged grievance and the events that resulted in his diminished job assignment. In addition, there is no showing that the individual making the layoff decision even had knowledge of a grievance. Mr. Kleinman failed to show any discriminatory connection between his layoff and any protected union activity and the charge of discrimination for engaging in protected union activity must be rejected.

The facts show that management made numerous attempts to assist the grievant in making job adjustments to meet some of his job related problems. He was also

assisted by management in finding a retreat option that he could move to after his layoff. However, based on his failure to exercise this option in a timely manner and several unsuccessful attempts to get him to inform supervision of his decision, the job was assigned to another laid off employee.

The State therefore asks, based on Mr. Klainman's failure to show evidence of age discrimination or Taylor Law violation, that the grievance be dismissed.

ARBITRATOR'S OPINION

In order for this grievance to be sustained the Union must carry the burden of showing that the State failed to continue its policy against all forms of

illegal discrimination, and particularly age discrimination with respect to the grievant, and/or show that the State discriminated against Mr. Kleinman in relation to his Taylor Act rights.

With respect to the charge of age discrimination the main evidence introduced by the Union in support of this contention is that Mr. Kleinman was laid off while a younger provisional employee in the same grade as Mr. Kleinman was retained. The Union maintains that this comprises an illegal act of discrimination by the State since it chose to retain a younger provisional employee over Mr. Kleinman, a Protected Class employee with superior right. The Arbitrator does not find that this fact in and of itself constitutes a prima

facie case of discrimination. It could merely indicate that the agency did or did not follow Civil Service rules for any number of reasons other than discrimination. There is no evidence, circumstantial or otherwise, that would lead the Arbitrator to conclude that the employer reached his decision to lay off Mr. Kleinman only after considering the factor of age, or that he did not treat age neutrally in reaching his decision. Whether or not the State properly laid off Mr. Kleinman in accordance with Civil Service policy and procedure is not involved in this arbitration and therefore need not be considered here. Suffice it to say that a single event of the misapplication of Civil Service policies and procedures, even if proven,

would not be enough to show that the decision was based on age prejudice. Nor did the Union successfully contradict the State's allegations that Ms. Raines did not hold the same job title, was funded from a different source, and therefore was not subject to displacement as a result of lay-offs. Nor has the Union shown any proof, other than their assertion to that effect, that Ms. Raines was younger than Mr. Kleinman, or that her age was taken into consideration in deciding to keep her instead of Mr. Kleinman.

The evidence relied upon by the Union in proving its charge of retaliation for filing a grievance consists of the allegation that the State tried to get rid of the grievant by

reassigning him to another building. When he went on sick leave in response to this move by the State, they attempted to force him out by sending him to involuntary medical examinations. When the medical examinations resulted in recommendations from the two examining physicians that the grievant should not be reassigned, they abolished his job. The Union acknowledges the State's right to assign, transfer and to make certain personnel determinations but finds its actions with regard to the grievant as constituting retaliation for filing a grievance. However, while showing that many unusual events happened to the grievant during the period in question, the necessary link between these events and the fact that Mr. Kleinman filed a

grievance is not established. Indeed, there was no copy of the grievance introduced as evidence. The Arbitrator does not find it unusual for an employer to order an employee to undergo a physical examination when the employee takes sick leave rather than report to his assignment. There is no showing that this action on the part of the State was for improper purposes, discriminatory or even harassment. As a matter of fact, the medical examination recommended that the grievant not be transferred. The budgetary crisis and the dislocation it produced during this time period effected many employees, including the grievant, but was a chance event that coincided with the other incidents involved in this grievance. The Union has failed to

demonstrate that any of the job movements that took place at that time resulted from anything but a response to the requirements placed on the agency by the State to reduce staff and budget. The one possible exception is the case of a provisional employee at the grievant's job grade who the Union alleges was retained while Mr. Kleinman, a permanent employee, was laid off and then offered a lower grade position. However, in this instance the Union has not established that the State in retaining the provisional employee by reason of her being employed in another program funded from a different source was improper.

The Arbitrator is not unsympathetic to the situation that Mr. Kleinman now finds himself in after many years of

service to the State. However, in order to find a contractual violation, a clear factual pattern supported by evidence must be established and presented to the Arbitrator. While there are many events that one may conjecture or speculate about there is insufficient proof, circumstantial or otherwise, to support the Union's contention that the State has changed its policy with respect to illegal discrimination with regard to age or the proper exercise of Taylor Law rights in this case, or that the grievant was improperly dealt with with respect to the prohibitions against discrimination for age or union activities.

Accordingly, the grievance is denied.

AWARD

1. The State of New York (Office of Mental Retardation and Developmental Disabilities - Central Office) did not violate Article 36.2 of the 1982-85 Agreement between the State and PEF on March 11, 1983.
2. The grievance is denied.

Date: May 16, 1984

Edward Levin
Arbitrator

STATE OF NEW YORK

SS:

COUNTY OF NEW YORK

Appeared before me this 16th day of May, 1984, EDWARD LEVIN, to me known, who did swear and affirm that he has executed the above and that all statements herein are true and correct to the best of his knowledge and belief.

Notary Public

(OMRDD Letterhead)

May 18, 1983

Mr. George Kleinmann
749 New Scotland Avenue
Albany, New York 12208

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Dear Mr. Kleinmann:

On May 13, 1983 a First Step Review meeting was conducted at 44 Holland Avenue on the Contract grievance you filed alleging violation of provisions of the Professional, Scientific and Technical Service Unit Agreement. Members of the Public Employees Federation presented your grievance. They stated that the contract provision that you allege has been violated is Article 34.2(b) of the Professional,

Scientific and Technical Services Unit Agreement.

STATEMENT OF FACTS

On January 3, 1983 you were reassigned from 44 Holland Avenue to 30 Russell Road by Mr. Thomas Cuite, Deputy Commissioner for Quality Assurance. On January 4, 1983 you filed a grievance in response to that reassignment. You were also examined by the Employee Health Services on several occasions because you indicated that you were ill and unable to report to work at 30 Russell Road. Those visits occurred on January 19, 1983, February 24, 1983 and March 9, 1983. You were then sent a letter from the Commissioner dated March 11, 1983 laying you off effective close of business, April 7, 1983. That date was

subsequently postponed until close of business, May 4, 1983.

POSITION OF THE GRIEVANT

It is your position that, due to your age you were laid off in violation of Article 34.2(b).

It is also your position that once you were examined by the Employee Health Service on May 9, 1983 that OMR/DD received information from the physician who examined you and because of the information from the Employee Health Service, OMR/DD then decided to lay you off and sent to you a layoff letter dated March 11, 1983.

REMEDY SOUGHT

To rescind your layoff notice and to return your work assignment to 44 Holland Avenue, in doing so to restore all rights

and benefits as if you had not been laid off.

POSITION OF MANAGEMENT

The decision to lay you off was not related to either your age or to the findings from the Employee Health Service Physician. It was rather a decision based on a mandate to reduce the number of positions in the Quality Assurance Division and to do it in an equitable manner within the Division and to do so with as little disruption of the Division's programs as possible. The Commissioner of OMR/DD was notified during the last week of January that there could be a need for substantial layoffs in the OMR/DD Central Office. He testified his Deputy Commissioners to prepare layoff recommendations during the

first week of February, 1983. During that week the Deputy Commissioner for Quality Assurance recommended layoffs to accommodate his position fill level and the dollar savings that were needed. He looked at the number of Administrative Assistants within the Division of which there were two, one assigned to him and the other to the Bureau of Certification Control. There were four bureaus in the Division and the other three bureau heads had previously requested Administrative Assistants; a request that the Deputy Commissioner was not able to grant. Organizationally, he deemed it best to keep one position that of Senior Administrative Assistant for himself and to lay the Administrative Assistant, G-18 off.

DISCUSSION

Article 36.2 states that "the State agrees to continue its established policy against all forms of illegal discrimination...". The State has not in any manner changed or discontinued its policy in this regard. The State's established policy continues to be against all forms of illegal discrimination.

The purpose of Article 36.2 is not to review individual claims of discrimination. The question of whether or not an individual has been subjected to a discriminatory act is not a matter for review by the grievance procedures. There are other appropriate avenues of redress, such as the Affirmative action

Officer and the New York State Division of Human Rights. The purpose of Article 36.2 is to provide a protection of Human Rights. The purpose of Article 36.2 is to provide a protection to the Union to assure that the State will not attempt to discontinue its established policy against all forms of illegal discrimination.

Inasmuch as the State has done that which it has committed itself to do in Article 36.2, i.e., has continued its policy against all forms of illegal discrimination, there has been no violation of Article 36.2. Even if this were not the case, you presented no evidence at all to demonstrate discrimination due to age. This aspect of your grievance is denied on its

merits.

The agency had requested that you be evaluated by an Employee Health Service Physician to determine your ability to perform the functions fo your position as you indicated that you were ill and not able to work at 30 Russell Road. You visited the Employee Health Service but were not evaluated on January 19, 1983. You were instead waiting for a statement from your own physician.

You were again scheduled for an evaluation by the Employee Health Service on February 24, 1983. The physician who examined you on that date said that he would not be able to give us an accurate evaluation without first having an evaluation by a consultant that works for the Employee Health Service on an

occasional basis. That scheduled examination was for March 9, 1983.

We received a letter from the Employee Health Service on March 15, 1983 stating that "I examined Mr. George Kleinmann, an Administrative Assistant, at the Employee Health Service on March 14, 1983.

It is the combined opinion of myself and my consultant that it would be appropriate for continued productivity not to place Mr. Kleinmann in his current work assignment."

You have contended that you were not examined by the Employee Health Services on March 14, 1983 and that OMR/DD did know of the consultant's and the physician's findings between March 9 and March 11, 1983 and that as a result of

those findings your name was added to the layoff list.

We received information from the Employee Health Service Physician concerning your ability to work only after they received information from the consultant which was on March 14, 1983. Prior to March 14, 1983, the Employee Health Service was not aware of the consultant's findings. We were not aware of their combined findings until we received the letter from the Employee Health Service dated March 15, 1983. The information that was presented by management describing the layoff plan and procedures and the information from the Employee Health Service concerning your visits and the date that they received the consultant's report do not

substantiate the allegations and these aspects of your grievance are denied.

DECISION

Your grievance is denied in all of its aspects. The Article 34.2(b) violation that you allege is denied due to previous decisions based on alleged violations presented in other contract grievances. In addition, the other allegations that you make are not substantiated on the facts presented. The decision to lay you off was based on programmatic needs and was done in accordance with established layoff procedures. No data was presented to substantiate the allegation that the decision to lay you off is due to your age.

If this decision is found to be unsatisfactory, an appeal may be filed by you or filed by PEF, through its President or his designee, with the Director of the OMR/DD's Office of Employee Relations within 10 working day~ of the receipt of the receipt of this decision. Any such appeal should be filed with:

Mr. Sheldon Kramer
Director of OMR/DD Employee
Relations
44 Holland Avenue
Albany, New York 12229

and shall include a copy of the grievance, a copy of all prior decisions and appeals, and a short plain written statement of the reasons for disagreement

with this decision.

Very truly yours,

/s/ Raymond E. Rockwell

Raymond E. Rockwell

Assistant Director of

Personnel

RER/pem

STATE OF NEW YORK
GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS

In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,
(George Kleinmann),
Grievant,

-and-

Professional,
Scientific &
Technical Svs
Unit

STATE OF NEW YORK (Office of
Mental Retardation and Developmental
Disabilities, Central Office

Employer.

Step 3
Decision
OER File:
83-05-366

Subject:
Assignment

(Non-Contract Grievance)

On January 4, 1983 this grievance
was presented at Step 1 of the grievance
procedure established in the 1982-85
Agreement between the Executive Branch of
the State of New York and the Public

Employees Federation, AFL-CIO for the Professional, Scientific and Technical Services Unit. Following denials of the grievance at the earlier steps, an appeal was submitted to the Director of the Governor's Office of Employee Relations on April 25, 1983. James D. Brown was designated by the Director as his representative. This Step 3 determination is based on a review of the record.

On January 3 grievant was informed that his position would be reassigned from 44 Holland Avenue to a location on Russell Road. This grievance contends that such reassignment violates an agreement made between grievant and management in June, 1982 under which grievant's position would remain at Holland Avenue, and that the reassignment

is therefore unfair and improper.

The agency position is that the position was intended to be reassigned in June of 1982; that an accommodation was made to grievant at that time because of previous unsatisfactory relationships existing between grievant and the person who would be his supervisor at the Russell Road location; that program needs would be more adequately met if the position were reassigned. Further, in order to continue to meet grievant's major objection to the earlier reassignment, the supervisor at the Russell Road location was reassigned out of that location at the time grievant was reassigned to that location.

The agency has not been unfair or improper in these actions. It has

attempted to meet its programmatic needs through the reassignment of grievant's position, but at the same time has, through the reassignment of the supervisor, made reasonable efforts to accommodate grievant's major objection to the reassignment. The grievance is denied.

Thomas F. Hartnett
Director

By James D. Brown
Assistant Director

Dated: June 10, 1983
Albany, New York

(OMRDD letterhead)

June 30, 1983

Mr. George Kleinmann
749 New Scotland Avenue
Albany, New York 12208

Re: Contract Grievance
Article 36.2
Submitted: April 12, 1983

Dear Mr. Kleinmann:

A Second Step Review Meeting was held at
Central Office on June 10, 1983,
concerning your grievance cited above.
Present at the meeting in addition to
yourself were:

For the PEF:

John Ryan, PEF Field Representative
Ted Ricket, PEF Council Leader
Charles Eysaman, PEF Shop Steward

For the Central Office:

Raymond Rockwell, Assistant Director of
Personnel

Sue VanBuren, Senior Personnel
Administrator

Thomas Cuite, Deputy Commissioner for
Quality Assurance

For the OMRDD/Employee Relations Office:

Barbara E. Roberts, Agency Labor
Relations Representative

STATEMENT OF FACTS

- At the time of this grievance,
grievant was an Administrative
Assistant, 57 years of age.
- On January 3, 1983, grievant was
reassigned from 44 Holland Avenue to
30 Russell Road by Mr. Thomas Cuite,
Deputy Commissioner for Quality
Assurance.

- Grievant was examined by the Employee Health Services on January 19, 1983, February 24, 1983, and March 9, 1983, as he indicated he was unable to work at 30 Russell Road due to illness.
- Grievant was laid off from the position of Administrative Assistant, Grade 18, effective close of business May 4, 1983.

ISSUE

Did the management of OMRDD violate Article 36.2 of the PS&T Agreement by the grievant's lay off effective May 4, 1983?

REMEDY SOUGHT

For management to rescind the layoff notice and to return grievant to prior

work assignment at 44 Holland Avenue with restoration of all rights and benefits as if grievant had not been laid off.

POSITION OF PEF

The union contends that the grievant's lay off violated the age discrimination provisions of Article 36.2 of the PS&T Unit Agreement.

The union further stated that the grievant, once laid off from the title of Administrative Assistant, became eligible for appointment to approximately 88 other "comparable titles", yet management had failed to provide the grievant with another option for employment at 44 Holland Avenue.

1

The grievant provided the Agency Level Reviewer with a brief history of his employment with OMRDD and finalized his comments by stating that his lay off was due to his age and as far as he knew he was the only one who actually "hit the street" as a result of the May 4, 1983, OMRDD lay off.

POSITION OF MANAGEMENT

Management stated that the decision to lay off the grievant was not related to either age or to the findings from the Employee Health Service physician. They reiterated management's position as stated in the Step 1 level decision and produced a copy of a Step 3 decision rendered by James Brown, Assistant Director of the Governor's Office of

Employee Relations, OER File No. 81-05-190. This decision addressed the Governor's Office of Employee Relations interpretation of the "No Discrimination" Article in the PS&T contract and states "the purpose of this Article is not to review individual claims of discrimination." -

Therefore management stated that a grievance hearing is not the appropriate forum for a complaint of discrimination. Additionally, management stated that the union did not present documentation or evidence of any sort to demonstrate that the grievant was a victim of age discrimination.

Management further stated the procedures followed in the decision-making to effect

a reduction in force in the Quality Assurance Division. Lay off recommendations were made by the Deputy Commissioner for Quality Assurance during the first week of February 1983. There were two Administrative Assistants within the Division, one assigned to the Deputy Commissioner for Quality Assurance and the other to the Bureau of Certification Control. Three of the four bureaus did not have the position of Administrative Assistant.

Therefore, subsequent to a review of all programs, a decision was made by the Deputy commissioner of Quality Assurance to retain the position of Senior Administrative Assistant for himself and to eliminate the Administrative

Assistant, G-1 8 position encumbered by the grievant.

In response to the grievant's eligibility for a number of other "comparable titles", it is the responsibility of the New York State Department of Civil Service, and not the agency, to make comparability determinations in connection with the certification of preferred lists.

DISCUSSION

Article 36-2 of the Professional, Scientific and Technical Unit states "The State agrees to continue its established policy against all forms of illegal discrimination with regard to race, creed, color, national origin, sex, age

or handicap, or the proper exercise by an employee of the rights guaranteed by the Public Employees Fair Employment Act." The Governor's Office of Employee Relations has ruled in a Step 3 decision dated March 26, 1983 (copy attached), that the purpose of the "No Discrimination" article of the PS&T Agreement is not to review individual claims of discrimination. "The question of whether or not an individual has been subjected to a discriminatory act is not a matter for review by the grievance procedure." The appropriate entities to address an allegation of age discrimination include the New York State Division of Human Rights, the Agency's Human Rights Council, and/or Affirmative Action Office, and the New York State

Civil Service Commission.

Based upon a thorough review of the entire record, facts and documents presented, I can find no violation of Article 36.2.

DECISION

Your grievance is denied in all of its aspects based upon a review of the facts presented at the Agency Level Review Meeting.

If this decision is found to be unsatisfactory, an appeal may be filed by PEF, through its President or his designee, with the Director of the Governor's Office of Employee relations within 15 working days of the receipt of

this decision. Any such appeal should be
filed with:

Thomas F. Hartnett, Director
Governor's Office of Employee Relations
Agency Building #2
Empire State Plaza
Albany, New York 12223

and shall include a copy of the -
grievance, a copy of all prior decisions
and appeals and a short, plain written
statement of the reasons for disagreement
with this decision.

Very truly yours,

Sheldon S. Kramer
Director
Employee Relations

BER/mrc

cc: Raymond Rockwell
John Ryan
Ted Ricket
- Barbara E. Roberts

STATE OF NEW YORK
GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS

In the Matter of Professional,
PUBLIC EMPLOYEES Scientific
FEDERATION, and Technical
AFL-CIO, Svs Unit
(George Kleinmann),

Grievant Step 3 Decision

-and-

OER File:
83-05-598

STATE OF NEW YORK (Office
of Mental Retardation
& Developmental
Disabilities,
Central Office),

Subject:
- No
Discrimination

Employer.

On March 23, 1983, this grievance was presented at Step 1 of the grievance procedure established in the 1982-85 Agreement between the Executive Branch of the State of New York and the Public Employees Federation, AFL-CIO for the

Professional, Scientific and Technical Services Unit. Following denials of the grievance at the earlier steps, an appeal was submitted to the Director of the Governor's office of Employee Relations on July 7, 1983. James D. Brown was designated by the Director as his representative. This Step 3 determination is based on a review of the record.

Grievant's permanent position of Administrative Assistant was abolished and his employment was terminated. This grievance contends that his position was selected for abolishment solely because of his age and in retaliation for his having previously filed a grievance, and thus constitutes a violation of Article 36, Section 36.2.

Section 36.2 provides that "The

State agrees to continue its established policy against all forms of illegal discrimination with regard to...age or...the proper exercise by an employee of the rights guaranteed by the Public Employees' Fair Employment Act."

While it is true that grievant's position was abolished and that he was laid off, that he had earlier filed a grievance, and that he no doubt is older than at least some of the employees of OMRDD (his age is not reported in any of the documents in the record), he has failed to establish that there is a cause and effect relationship between any of these facts. In the absence of the establishment of any causal relationship between his age and/or his having filed a grievance and his subsequent termination,

there can be no finding of a violation of
Article 36.

The grievance is therefore denied.

Thomas F. Hartnett
Director

By: /s/ James D. Brown
James D. Brown
Assistant Director

Dated: August 8, 1983
Albany, New York



Plaintiff's
Exhibit

1A

A-233

Charge No: 023840459

Edward Kleinman
749 Scotland Avenue
Albany, New York 12208 Charging Party

Office of Mental Retardation and
Developmental Disabilities
44 Holland Avenue
Albany, New York 12229 Respondent

All title VII jurisdictional requirements and Age Discrimination in Employment Act have been met. Charging Party alleged that he was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended by being retaliated against for having filed several grievances and complaints against the Respondent and finally was terminated. He also alleged that the

above actions were in violation of the Age Discrimination in Employment Act.

Examination of the evidence indicated that there is reasonable cause to believe that these allegations are true. No determination is made as to any other issues which might be construed as having been raised by this charge.

Accordingly, I conclude that Respondent violated Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act, by retaliating against the Charging Party for filing grievances and complaints against them and terminating his services because of his age.

Having determined that there is reasonable cause to believe the charges are true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A "Notice of Conciliation Process" is enclosed for your information. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

The ADEA allegations of the above numbered charge are subject to separate statutory provisions. The Commission has found a violation under the ADEA. The findings with respect to ADEA violations are enclosed. The Charging Party also has a right to sue under the ADEA.

Unlike Title VII, the ADEA does not require the Charging Party to bring suit within 90 days of final agency action. (See the enclosed pamphlet for time limitation filing suit under the ADEA).

If you have any questions regarding the differences in legal remedies between Title VII and the ADEA, please contact Sidney Harris, Director, Buffalo Local Office at (716)846-4441.

On behalf of the Commission:

Date	Arthur W. Stern
	Deputy District Director
	New York District Office

Enclosures:
Notice of Right to Sue
Copy of Charge
ADEA Pamphlet

(EEOC letterhead)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO AREA OFFICE
210 FRANKLIN STREET, ROOM 503
BUFFALO, NEW YORK 14202

Charge No: 023840459

George F. Kleinmann
749 Scotland Avenue
Albany, New York 12208

Charging Party

New York State Office of
Mental Retardation and
Developmental Disabilities
44 Holland Avenue
Albany, New York 12229

Respondent

LETTER OF VIOLATION

I issue on behalf of the Commission the following findings as to Respondent's compliance with the Age Discrimination in Employment Act (ADEA).

The Commission has determined that the above named Respondent has discriminated

against George F. Kleinmann in violation of the ADEA by abolishing his position and discharging him from employment because of his age (57) and his opposition to practices by Respondent which are forbidden by the ADEA.

Section 7(b) of the ADEA requires that before instituting any action, the Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion. Section 7(e)(2) of the ADEA provides that the statute of limitations period which is applicable to Commission enforcement will be tolled for up to one year after conciliation is begun.

This determination will serve as notification that the Commission is prepared to commence conciliation in accordance with Section 7(b). The period during which the statute of limitation is tolled, as provided in Section 7(3)(2), begins upon issuance of this letter.

On behalf of the Commission

Arthur W. Stern
Deputy District Director
New York District Office

Date

(EEOC letterhead)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO AREA OFFICE
210 FRANKLIN STREET, ROOM 503
BUFFALO, NEW YORK 14202

January 10, 1984

Case Control Unit-EEOC Section
State of New York
Division of Human Rights
#2 World Trade Center, 53rd Floor
New York, New York 10047

Re: Charge No.: 023840459
George Kleinman v NYS Mental Health
Office

Dear Sir/Madam:

Enclosed for filing with your agency is a copy of the above-referenced charge filed with the Equal Employment Opportunity Commission which alleged unlawful practices under the Age Discrimination in Employment Act (ADEA). This referral is made for the sole purpose of protecting

the private suit rights of the Charging
Party under the ADEA.

Upon receipt of a charge, the EEOC is
required to attempt to resolve the matter
through informal methods of conciliation,
conference, and persuasion. We plan to
initiate conciliation action and to
undertake further appropriate processing
of this matter in the near future.

Thank you for your cooperation in this
matter.

Sincerely,

Sidney Harris
Area Director
Buffalo Area Office

SH/etc

Enclosure

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
 BUFFALO AREA OFFICE
 210 Franklin Street, Room 503
 Buffalo, New York 14202

RECEIPT FOR COPY OF CHARGE OF DISCRIMINATION

(To be completed by respondent upon receipt of a Charge of Discrimination and returned to the EEOC District Office named above or the EEOC representative named below.)

CHARGE NUMBER

023627A52

(ALPHANUMERIC)

CHARGING PARTY(IES)

George E. Eisman

NYC Mental Health Office

I hereby acknowledge receipt ☐ by mail ☐ personally, a copy of the charge(s) of discrimination identified above, stating generally, without elaboration, the violation of Title VII of the Civil Rights Act of 1964. The signing of this receipt does not constitute admission of responsibility of Title VII or any other law.

DATE INDIVIDUAL ACCEPTING CHARGE (Title)

SIGNATURE

CERTIFICATION I certify that I personally mailed/delivered a copy of the Charge(s) identified above to the respondent.

DATE

EEOC REPRESENTATIVE (Typed name)

SIGNATURE

Richard A. DeLoach

EEOC FORM 150
 MAY 73

This page of the appendix
contains an EEOC form. It
cannot be reproduced here
without use of photoreduction.

A-244

A-244

(EEOC letterhead)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO AREA OFFICE
210 FRANKLIN STREET, ROOM 503
BUFFALO, NEW YORK 14202

December 21, 1984

Edward Kleinman
749 Scotland Avenue
Albany, New York 12208

Charge No: 023840459
Respondent: Office of Mental
Retardation and
Developmental Disabilities

Dear Mr. Kleinman:

This is to remind you that the statute of limitations period for obtaining relief under the Age Discrimination in Employment Act (ADEA) is two years preceding the date a private lawsuit is filed, or three years, if the violation is willful. As you are aware, the Commission has found that the Office of

Mental Retardation and Developmental Disabilities has violated the ADEA, and we are currently trying to negotiate a settlement with respect to our findings. These settlement attempts by the Commission are required by the ADEA. While they serve to extend the time frame for the Commission to file a lawsuit, they do not postpone the date by which a private lawsuit must be filed. Thus, you should contact me or Raphael DuBard immediately for advice as to the steps necessary to safeguard your rights under the ADEA. If you have an attorney, we advise you to share this letter with him/her.

Please call collect, at 716/846-4441, if you have to call long distance.

Sincerely,

/s/

Sidney Harris, Director
Buffalo Local Office

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APPE

VOL.

NDIX

III

91-775

FILED

JUN 25 1991

OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GEORGE KLEINMANN,

Petitioner,

v.

MARIO CUOMO, AS GOVERNOR OF THE
STATE OF NEW YORK, THE STATE OF NEW
YORK AND ARTHUR Y. WEBB, AS
COMMISSIONER OF THE NEW YORK STATE
OFFICE OF MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX - VOLUME 3

MADELINE SHEILA GALVIN
Attorney for Petitioner
217 Delaware Avenue
Delmar, New York 12054
(518)439-7734



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GUIDELINES FOR THE ADMINISTRATION ON
REDUCTIONS IN FORCE IN NEW YORK STATE
DEPARTMENTS & AGENCIES

NYS Department of Civil Service
February, 1983

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INTRODUCTION

These guidelines are intended to provide agency personnel managers with concepts, methodologies and procedures which are essential to the effective administration of a reduction in force. The materials contained in these guidelines are generally limited to issues that exist from the point at which the overall agency plan is submitted to the Division of the Budget. However, we have also included in the appendix portion, critical information concerning Affirmative Action/Equal Employment Opportunity impact analysis that must be completed prior to submitting the overall plan.

While we expect these guidelines to provide general assistance in dealing with a wide range of issues, personnel managers are advised to work closely with their designated Civil Service liaisons as specific needs and questions arise.

Additional materials are being developed and will be distributed for inclusion in these guidelines in the coming weeks.

PART I

CONCEPTS AND CRITICAL DEFINITIONS

PART I, CONCEPTS AND CRITICAL DEFINITIONS

The term "layoff" is commonly used whenever an employee is separated from State Service. However, not all employees who are "laid off" are entitled to "rights" under the Civil Service Law. To have rights under these Sections the employees and nature of the separation itself must meet the following general conditions:

The separation must occur because positions are being abolished;

The employees must have permanent status;

The employees are in competitive or non-competitive jurisdictional class positions. Labor class employees are

granted similar rights through negotiated agreements.

Layoffs in the context of this material are always confined to layoff units and to the titles and positions identified in these units. Formal determinations of layoff unit definition exist for every State department and agency and may reflect agreements made through collective bargaining.

It is within the defined layoff unit that employees are suspended or demoted, exercise their rights to be retained, and within which they displace (bump or retreat). These terms are described in more detail later.

Definitions of Some Critical Layoff Terms

1. Retention Rights - Employees have different rights to be retained under Section 80 and 80-a according to jurisdictional classification, their status in a position, and their seniority.

Without Retention Rights

- Provisional and temporary employees,
- Employees in exempt and unclassified service positions,
- Non-competitive class (and labor class) employees who do not have tenure protection outlined under Section 75.1(c)

of the Civil Service Law,
modified by negotiated
agreement (see below),

- Permanent contingent employees
appointed under old Rule 4.11.

With Retention Rights

- Permanent competitive class
employees, including
probationers and contingent
permanent employees appointed
under new Rule 4.11 (post
12/18/80),
- Permanent non-competitive (and
labor class) employees having
tenure protection under Section
75.1(c) as modified to include
those having one year of
continuous service.
- Of those that do have retention

rights, some have greater retention rights, or rights to be retained, than others. Probationary employees are defined by law as having less retention rights than those who have completed their probation. That is, a probationer must be laid off in a title before a non-probationer. Within either of these categories employees are laid off in seniority order.

2. Seniority - Seniority for purposes of layoff should not be considered synonymous with seniority for other purposes such as retirement, anniversary dates, seniority for

leave accrual purposes, or seniority for bidding for shift work or pass days. For layoff, the definition is:

DATE OF ORIGINAL PERMANENT
APPOINTMENT IN THE CLASSIFIED
SERVICE AND CONTINUOUS SERVICE SINCE
THAT DATE.

This date is modified, however, for veterans who get 2 1/2 years additional seniority, disabled veterans who get 5 years additional seniority, and legally blind employees who regardless of their original date of permanent appointment are considered the most senior employees of all employees in their title in the same category of retention status.

3. Continuous Service - Seniority -
Continuous service, is defined for determining seniority under Section 80 and 80-a as service unbroken by periods out of service of one year or more. For example, a permanent competitive employee's employment history file reads:

OC Perm 1/1/80

Resign 6/1/81

Perm Reinst 5/1/82

The employee's seniority data is
1/1/80 (assuming non-vet).

4. Continuous Service for Determining
Tenure Protection Under Section
75.1(c) - is also defined as service
unbroken by periods out of service

of one year or more. The difference between these two types of "continuous service" is that for Section 75.1(c) this service need not be permanent. Only persons who have permanent service at the time of suspension have rights under 80-a.

PART II

METHODOLOGIES AND PROCEDURES

PART II

METHODOLOGIES AND PROCEDURES

The efficient administration of a reduction in force regardless of the number of positions and employees affected requires the development and consistent application of a methodology that will enable the personnel manager to systematically deal with the people and issues involved.

At the outset, we suggest the following as a basic first step in order to begin the process of identifying actions to be taken that directly affect employees' status.

Based on the plan for the Reduction in Force, we suggest developing an "Organizational Layoff Schematic" for each designated layoff unit. This "Schematic" or chart can be drawn by listing all titles in which positions will be abolished in each of the layoff units starting with the highest level title and continuing to the lowest.

For each of the titles which appear on the schematic or chart, identify the "direct line of promotion". For these purposes, direct line of promotion is a narrow concept and generally means that such titles must have a common generic root. For example, a direct line would exist in the case of Clerk, Senior Clerk, Principal Clerk, Head Clerk, Chief Clerk-

Senior File Clerk would not be in direct line even though a number of Senior File Clerks in the department may have, in fact, been promoted to Principal Clerk from the Senior File Clerk position. Many direct lines are obvious, however, such determinations must be made as early as possible. Any questions concerning direct line should be directed to your designated liaison in the Department of Civil Service.

By charting out the portions of the organization affected and identifying direct lines of promotion, you can begin to recognize and deal with the "chain reaction" facet of layoff administration. The first effects of decisions to abolish certain positions

obviously impact employees in that title. These decisions and actions taken will probably, through displacement procedures, effect employees in the next level and so on down through the direct line and potentially throughout the entire layoff unit.

It may be helpful to view layoffs as occurring in "waves" in which decisions made for one level impact the next and the next and so on, leaving behind a trail of reversions to old items, reassignments, and vertical displacements with concurrent establishment of referred list status and eventually outright terminations.

The critical point is that decisions

concerning one individual employee probably affect other employees' rights. Consequently, impacts on all employees must be anticipated and considered.

In order to identify specific employees who may be affected directly or indirectly by the planned reduction in force, certain basic sources of employee related information are necessary.

The first is a Seniority Roster. The seniority roster is produced from the Department of Civil Service Automated Payroll and Personnel System (APPS) and is based on information as of a given payroll date. Each agency is responsible for ensuring that the information is correct. New hires or separations in a

title identified for layoff and reflected on the seniority roster should be added by the agency prior to making final layoff decisions.

Information on individual employees, i.e., status (permanent, temporary, probationer), veterans status, sights status, etc., is assumed to be correct. Any changes in this information must be made in writing to the Department of Civil Service with an explanation of the reasons for the change and appropriate documentation, e.g., copies of a DD-214, appointment letter, probationary report, etc. Each agency is responsible for correctly identifying which employees will be laid off and which retained pursuant to Section 80 and Section 80-a

of the Civil Service Law.

Reading The Seniority Roster

1. The roster includes all titles.

This was done for ease of production, and to allow each agency to assess potential impact of layoffs in any program area.

2. The roster is provided in title code order, from the lowest number to the highest number. To find a specific title (see exception below) use your Title and Salary Plan to find the title code for the title.

3. Although trainee titles are assigned separate title codes in the Title and Salary Plan, employees serving in these titles are treated as probationers for the journey level

title for layoff purposes. All employees serving in those positions whether as trainee or at a journey level must be considered as one group under one title. The grouping of titles was done by assigning "dummy" title-codes combining these employees (e.g., 999999A). These will be listed at the end of the seniority roster.

4. Some names may appear more than once. Permanent employees on leave from a position must be considered with employees actually serving in a position in a title affected by reductions. The seniority roster will show both a vacant position with encumbering information and the encumbering employee's name in the

appropriate rank on the seniority roster.

5. The seniority roster ranks all items in a title as follows:
 - a. Vacancies
 - b. Non-permanent employees (and contingent employees (old rule, prior to 12/18/90)
 - c. Probationers
 - d. Fully permanent employees"New rule" contingent-permanent employees appear in their appropriate categories probationers or fully permanent employees.

Note that under Civil Service Law and layoff procedure all non-permanent employees in a title are equally at risk in layoff situations

since they have no retention rights or seniority. Therefore, the "rank" of non-permanent employees on a seniority roster may be ignored when such employees are terminated. However, this does not preclude an agency from using date of appointment to the classified service as an equitable mechanism for making these decisions.

Probationers and fully permanent employees are ranked among themselves in seniority order under "Class. Senior. Date." This date includes adjustments for veterans status. Where the APPS system has no information on veterans status, employees are coded as non-vets.

Blind employees will appear as the most senior employees among all employees with equal retention rights in the title. For example, a blind probationer is the most senior of all probationers in that regardless of date of original permanent appointment, but is still less senior than fully permanent employees in the title.

6. The codes used under "APPT TYPE" are defined as follows:

VA = Vacant

PV = Provisional

TP = Temporary

COP = Contingent Permanent
Probationer

PMP = Permanent Probationer

PM = Permanent - probation
 completed

CO = Contingent Permanent -
 probation completed

7. All questions on seniority rosters should be directed to your designated liason in the Department of Civil Service.

The second employee information source is completed Employee Information and Location Sheets (EI/LS). The Department of Civil Service is currently providing EI/LS for agency use in allowing employees to verify their title, veteran's status, probationary status, preferred list seniority and address information and to allow employees to

indicate the counties in which they would accept reemployment from a preferred list. El/LS is not to be used as a notice of layoff.

El/LS are not to be sent to the Department of Civil Service to place names of employees on a preferred list. You should, however, find these useful when completing the Preferred List Eligible Cards which are to be submitted to the Department of Civil Service.

A third source of employee information is strongly suggested depending upon the size and geographic distribution of a particular agency layoff unit.

If the layoff unit involves a large number of employees and is complicated by multiple geographic locations, it is

critical for agencies to obtain employee locational references for both possible reassignment and displacement (bump or retreat) prior to planning specific movements of personnel. A sample questionnaire for use in obtaining this information is supplied on the following page. Such a questionnaire requires that the agency prepare and attach a listing of specific location possibilities within the layoff unit.

Location Preference Questionnaire

Reassignment and Vertical Displacement

Name

Social Security Number

Signature

Date

The information requested by this form is necessary to ensure that each employee who is impacted by a reduction in force is treated equitably during the reassignment and vertical displacement (bumping) phase.

This form will not be used to record your location preference for reemployment from any preferred list.

Only the location possibilities within your layoff unit, as indicated on

the attached sheet, may be selected for reassignment or for vertical displacement.

You must list locations where you are willing to accept reassignment in your present permanent title and vertical displacement to the next lower level direct line title in absolute order of preference. Separate column are provided for reassignment and vertical displacement.

This form must be returned to the personnel office by _____. If not received by that date you will be considered only for locations within the county of layoff. Choices for reassignment and vertical displacement may not be changed after _____.

Preffered list location choices that

you supply separately may be added to at
a later date by writing to the NYS
Department of Civil Service.

REASSIGNMENT

VERTICAL

DISPLACEMENT

Reductions in Force in Layoff Units Where Only One Geographic Location is Involved. Referring to your agency plan, identify the highest level title in which positions will be abolished, and the number of positions to be abolished in that title. Use the seniority roster to identify employees retention standing and seniority.

Three categories of employees will be identified. Each category and the relative retention standing of each of these categories is discussed below.

1. Non-permanent Employees - Identify all temporary and provisional employees and contingent permanent employees appointed prior to 12/18/80. (Rule 4.11 revised

effective 12/18/80) These employees have no retention right, no rights to preferred list status, and must be suspended before permanent or permanent probationary employees serving in the target layoff title.

2. Probationary Employees - Next identify employees serving in a probationary status. Probationary employees have less retention standing than fully permanent employees. They are, however, entitled to preferred list status if suspended, and mayu also be entitled to exercise vertical displacement rights if they are unable to be restored to their hold items (Rule 5.5(d) and (2).
3. Permanent and Contingent Permanent

(Post 12/18/80) Employees - Identify employees serving in permanent and contingent permanent (post 12/18/80) status. (Rule 4.11 revised effective 12/18/80) These employees have the most retention rights. They are entitled to exercise verticle displacement rights, bumping or retreats, (bumping rights are only available in the competitive class). If suspended their names will be placed on a preferred list.

Identifiy Employees To Be Suspended

Based on the number of positions to be abolished, identify the employees who will be suspended.

Step 1 - Suspension of Non-permanent
Employees

- a. If these non-permanent employees are on leave from other permanent positions in the layoff unit, restore them to their hold items.
- b. If these employees are on leave from other agencies, notify the agency(ies) immediately that the employee will be suspended.
- c. If employees have no hold items (i.e., no permanent reinstatement rights) prepare notice of separation (three weeks prior to actual termination date) and enter their name on a list of

employees not entitled to
layoff rights or preferred list
status.

If the number of non-permanent employees equals the total number of positions to be abolished in the target layoff title no further action for the title is necessary. If the number of non-permanent employees is less than the total number of positions to be abolished, proceed to the next step.

Step 2 - Suspension of Probationers

Identify the probationers (beginning with the least senior) to be suspended.

- a. Restore them to their hold items.

- b. If these employees are on leave from other agency(ies) notify the agency(ies) immediately that the employee will be suspended.
- c. The names of probationers so restored will be placed on a preferred list for the target layoff title.
- d. Only where no hold item is available for the return of the probationer may the probationer be considered for vertical displacement opportunities.
(See Step 3 below).

If the number of positions to be abolished is greater than the number of employees suspended in Steps 1 and 2, proceed to Step 3.

Step 3 - Suspension of Permanent or
Contingent Permanent (post 12/18/80)
Employees.

These employees have the greatest
rentention standing and may be entitled
to exercise vertical displacement rights.
(See below for specific procedures for
(a) Bumping and (b) Retreat).

a. Bumping

In order to determine if bumping can
occur you will need to refer to the
layoff plan, the agency organization
schematic, the direct line promotion
title listing, and the seniority
roster.

Only if lower level direct line
titles exist in the layoff unit, and

only if they are occupied, that is not all vacant or not simultaneously abolished, can bumping occur. If these conditions are met, proceed as indicated below.

1. Begin with the most senior employee whose position will be abolished.
2. Identify the least senior employee in the lower direct line title with the least retention rights/seniority.

Note that a probationer who may be eligible to exercise "bumping" rights can only do so if the employee serving in the lower direct line title is also a probationer and has less seniority.

3. Determine if bumping employee has more retention rights/seniority than the employee identified in (2) above. If so, bumping can occur. Note that a probationer who may be eligible to exercise "bumping" rights can only do so if the employee serving in the lower direct line title is also a probationer and has less seniority.
4. Repeat the steps in (1), (2) and (3) above until the remaining employees in the layoff target title have been accounted for. If at any point in this part of the process you find that an employee in the

layoff target title has less retention rights or less seniority than an employee serving in the lower direct line title, no further bumping can occur, nor can the employee(s) be considered for retreat rights.

5. If the senior employee's seniority is greater than the seniority of an employee serving in a lower direct line title the senior employee can bump and his or her name will be placed on a preferred list for the target layoff title.
6. If the senior employee's seniority is equal to or less than the seniority of the

employee serving in the lower direct line title bumping cannot occur, nor can the senior employee be considered for Retreat. The senior employee must be laid off and his/her name placed on a preferred list.

b. Retreat

Retreat can only occur when no lower level occupied position in a direct promotion line title exists in the layoff unit. "Retreat" means return to the lower title -- held on a permanent basis. In order to determine an individual's retreat rights, a number of factors relating to the individual's specific

(

employment history must be considered.

You will need to refer to each employee's employment history, the agency organization schematic for the layoff unit, and the seniority roster.

1. Determine if the employee's last permanently held lower classified service title exists in the layoff unit, and if it is currently occupied.
2. If title does not exist or if title is not occupied, retreat cannot occur.
3. If title is occupied, identify the least senior employee in lower level title with the

least retention
rights/seniority.

4. Determine if "retreating"
employee has more seniority
than employee identified in (3)
above. If so, retreat can
occur.
5. Repeat steps 1 through 4, until
the remaining employees in the
target layoff title have been
accounted for.
6. If at any time an employee in
the layoff target title has
less seniority than an employee
serving in the title being
considered for retreat, retreat
cannot occur for that employee.
7. If the conditions for Retreat
are met the employee(s) name(s)

will be placed on a preferred list for the target layoff title.

8. If the conditions for Retreat are not met, the employee(s) must be laid off and their name(s) placed on a preferred list.

(HANDWRITTEN NOTATION ON THIS PAGE)

"Not done with George. Only found out about retreat when PEF representative told them -"

Step 4

Repeat Steps 1 through 3 for each succeeding lower level target layoff title using your _____ncy layoff plan and the "organizational layoff schematic".

As work on each title is completed, you should be sure to annotate the seniority roster. Develop listings, categorizing the employees who have been affected, how they have been affected, i.e., restoration to hold items, whether they exercised displacement rights, whether they were or were not entitled to preferred list status, when layoff information was transmitted to Civil Service and what payroll transactions need to be prepared.

These listings serve as
documentation for the actions taken.

Information concerning preparation
of employee notifications, Preferred
List Eligible Cards and payroll and
personnel transactions are provided
in Part III of these Guidelines.

Reductions in Force in Layoff Units Where
Multiple Geographic Locations Are
Involved

Reductions in force which occur in layoff units involving multiple geographic locations are infinitely more complex than those which occur in a single location. In addition applying and implementing the basic concepts concerning retention standing and seniority, together with vertical displacement rights, the agency's ongoing authority to assign and reassign staff becomes a significant factor in layoff administration. Although Sections 80 and 80(a) of the Law do not extend protection to employees in this regard, it is

important that agencies develop and apply consistent methods for implementing horizontal (lateral) reassignments when positions are to be abolished.

Lateral reassignments may be accomplished in a number of ways which will meet legal requirements, and agencies are advised to carefully consider the method selected and utilized. Based on the experiences and insights gained in administration of previous reductions in force, we recommend that an "Equal Numbers Method" of lateral reassignment be utilized.

In brief, this "Method" calls for identifying and sorting a group of more senior incumbents of positions which are being abolished. against a group of equal number of the least senior employees

serving in positions which will not be abolished, and which exist at other locations in the same layoff unit. An "Equal Numbers Method" provides a practical administrative process by which expanded lateral displacement opportunities are afforded to the identified group of senior employees in relation to the identified group of least senior employees.

Quickly obtaining an accurate, ranked listing of the location preferences of the group of senior employees is critical to the sorting process. In this regard agencies should make every attempt to obtain information from employees as soon as possible, once it is known that a layoff is likely to occur (Classified Service Rule 5.5(b)).

This information should be obtained in writing whenever possible, and should be retained by the agency for documentation purposes. (See previous information on Geographic Location Questionnaire)

Employees who refuse a lateral reassignment to a location that they had previously selected where a less senior employee of the identified group is serving, cannot be considered for other lateral reassignments. (See Equal Method Procedures) Nor are they entitled to exercise vertical displacement rights. They must be suspended. Traditionally, such employees have been granted preferred list status in conjunction with established practice of the Department of Civil Service.

In keeping with the organizational

schematic discussed earlier, once again we recommend that the highest target layoff title be dealt with first, since the effects of the lateral reassignment phase may create a chain reaction directly impacting on lower level direct line titles and other lower level titles within the layoff unit.

Prior to beginning the reassignment phase, agencies should consider if non-permanent employees will be subject to immediate suspension or if they will be considered within the group of least senior employees once identified. Similarly the situations of probationers should also be considered prior to beginning the reassignment phase.

Procedures Outline for Administering
Reductions in Force in Multiple
Geographic Location Layoff Units

Begin with the highest level target
layoff title.

2. Identify the total number of
positions to be abolished.
3. Identify the number of positions to
be abolished in each geographic
location within the layoff unit.
4. Determine if non-permanent employees
will be suspended prior to lateral
reassignment phase.
5. Determine if probationers will be
included in the reassignment phase.
6. Use the "Equal Numbers Method" or a
method approved by your Agency's
designated Department of Civil
Service liaison, and complete

lateral reassignment phase. (See
Equal Numbers Method Procedures)

7. Determine Vertical Displacement Rights (Bumping or Retreat) for employees who were displaced as a result of the lateral reassignment phase.
8. Complete vertical displacements (Bumping or Retreat) if any.
9. Repeat procedures 2 through 8 using the Agency layoff plan and organizational layoff schematic.

Equal Numbers Method Procedures

Set forth below are the actual procedures to be followed in utilizing the "Equal Numbers Method" of lateral reassignment.

Assume that the following information has been identified:

- The total number of positions to be
abolished in the entire layoff unit.
- The geographic location of the
positions to be abolished.
- The number of positions to be
abolished at each geographic
location within the layoff unit.
- 1. Using the seniority roster for the
layoff unit, count down (from least
to most retention rights and
standing) to obtain a list of

employee names equal in number to the total number of positions that will be abolished in the target layoff title in the layoff unit.

(This group of employee names will be referred to as LESLU (Least Senior Employees in the Layoff Unit) in the following procedural steps.)

NOTE: If the number of non-permanent employees serving in the target layoff title is greater than the number of positions to be abolished, expand the LESLU Group to include all non-permanent employees. Permanent employees whose positions are to be abolished should be offered the opportunity to

displace any of these non-permanent employees. (See Step 6 Below)

2. Develop a seniority roster for each geographic location in the layoff unit.
3. At each geographic location where a position(s) will be abolished count down a corresponding number of names and draw a line. (In locations where no positions will be abolished, draw a line above the first name on the geographic location seniority roster(s)).
4. Three groups of employees can now be identified:

Group 1 - Employees whose names appear on both the layoff unit seniority roster (LESLU) and who

old position(s) being abolished in one of the geographic locations.

Group 2 - Employees whose names appear on the layoff unit seniority roster (LESLU) but who hold positions which will not be abolished.

Group 3 - Employees whose names were not identified on the layoff unit seniority roster (LESLU) and who hold positions which will be abolished.

5. Suspend all employees in Group 1, since they are least senior and their positions will be abolished.
6. Beginning with the most senior employee identified in Group 3

above, and using the employee's ranked geographic location preference(s), offer reassignment to any other geographic location where a Group 2 employee is serving.

- a. If the most senior Group 3 employee is willing to accept reassignment to any location in which a Group 2 employee is serving, that Group 2 employee is now identified for suspension.
- b. If the most senior Group 3 employee is unwilling to accept reassignment, then the Group 3 employee is laid off, and his/her name is placed on a Preferred List (assumes

permanent status).

- c. If the most senior Group 3 employee has not selected a location in which a Group 2 employee is serving, then the Group 3 employee is laid off and his/her name is placed on a Preferred List (assumes permanent status).

- 7. In seniority order (most to least) continue to compare each Group 3 employee and his/her geographic location preferences against the locations of the remaining Group 2 employees, until all Group 3 employees have been given the opportunity to laterally displace Group 2 employees.

8. If any Group 2 employees continue to hold positions after completion of the above comparisons, and any Group 2 employees were previously displaced, those Group 2 employees should now be given the opportunity to be retained in the available positions in order of their retention-standing and seniority.

SAMPLE PROBLEM - Equal Numbers Method

Assume an agency has 12 employees in a title working at these locations, Albany, Syracuse and Ne York City. All locations are in the same layoff unit and currently there are four employees at each location. Program needs require

that the New York City Office remain open and fully staffed, and Albany maintain at least three positions. However, management has decided to close the Syracuse Office. A total of five positions in the title will be abolished.

To provide more senior employees with an opportunity to retain a job and to lay off the least senior/least retention right employees, the agency compares the layoff unit seniority roster, and on each locational seniority list a line is drawn indicating the number of positions to be abolished. (Steps 1, 2 and 3 are discussed in the "Equal Numbers Method" Procedures).

GEOGRAPHIC SENIORITY

ROSTERS

LAYOFF UNIT

ALBANY/SYRACUSE/NEW YORK CITY

SENIORITY ROSTER

	1	4	0
1. NYC*			1
L			
2. NYC* E			2
3. Syracuse*S		3	
4. Albany* L	4		
5. Albany* U	5		
6. Albany	6		
7. Syracuse		7	
8. Albany	8		
9. Syracuse		9	

10.Syracuse	10	
11.NYC		11
12.NYC		12

TOTAL NUMBER OF POSITIONS TO BE
 ABOLISHED - - - - - 5

* LEAST SENIOR EMPLOYEES IN THE LAYOFF
 UNIT - LESLU.

As discussed in the "Procedures" (Step 4) those groups of employees can now be identified. They are:

Group 1 - Employees who appear on both the layoff unit seniority roster (LESLU) and who hold positions being abolished in one of the geographic locations. In this example, these employees are #3 in Syracuse, and #4 in Albany.

Group 2 - Employees who appear on the layoff unit seniority roster (LESLU) but who hold positions not being abolished. In this example these employees are #1 and #2 in NYC, and #5 in Albany.

Group 3 - Employees who were not

identified on the layoff unit seniority roster (LESLU) and who hold positions which will be abolished. In this example, these employees are #10, #9, and #7, all located in Syracuse.

Group 1 - (3,4)

Group 2 - (1,2,5)

Group 3 - (7,9,10)

Since employee #3 and #4 are found in Group 1, they are immediately identified for layoff. (See the Procedures - Step 5)

Employees in Group 3, are now compared with employees in Group 2 and are offered the opportunity for reassignment. (See Procedures - Step 6)

Employee #10 (most senior) is offered the first opportunity to be reassigned to either Albany (#5) or NYC (#1, or #2). Assume that #10 selects New York City. Since there are two Group 2 employees at that location, the agency should reassign #10 to the position held by the least senior employee, (#1).

Next, employee #9 who is now the most senior Group 3 employee, is offered reassignment to either NYC or Albany (employee #2 or #5). Assume employee #9 refuses either location. Employee #9 is notified that he/she will be laid off and his/her name placed on a preferred list. Employee #9 is also told he/she has no vertical displacement or retreat rights.

Employee #7 is now offered an opportunity to be reassigned to either

Albany or NYC (employee #2 or #5).

Assume #7 chooses Albany.

All Group 3 employees have now been compared and are accounted for. Two Group 2 employees remain, #2 in New York City and #5 originally located in Albany and who was displaced by #7.

Since employee #5 has more seniority than employee #2, employee #5 should be offered reassignment to New York City. (Procedures, Step 8). Assume employee #5 accepts.

The final outcome of the lateral reassignment is summarized below.

Employees - 2, 3 & 4

Result - Have section 80 rights, go on a preferred list; bumping or retreat rights to be determined.

Employees - 5, 7, 10

Result - Reassigned to new location
effective date of layoff.

Employees - 9

Result - No rights under Section 80 but
will be placed on a preferred list by
Civil Service policy for any locations
except New York County or Albany County.

Employees - 6, 11, 12

Result - No change in work location.

Reductions in Force - Non-Competitive and Labor Class Positions

The procedures used to administer reduction in force which affect non-competitive and labor class employees are similar to those previously discussed in detail in these Guildelines, therefore, they will not be repeated.

However, it is critical to understand that retention rights conferred upon non-competitive class employees under the provision of Section 80-a of the Civil Service Law, are contingent upon the tenure definition contained in Section 75.1(c) of the Law as modified by negotiated agreements. Although labor class employees are treated similarly, there is no statutory

provision which extends them such retention rights.

To obtain tenure rights under Section 75.1(c), employees must meet three criteria.

1. They must not be serving in positions designated by the Civil Service Commission as confidential or requiring the performance of functions influencing policy. Non-competitive class positions are listed in Appendix 2 of the Civil Service Law. Policy influencing or confidential positions are identified by the Greek letter (phi) in the listing. Do not confuse "confidential" with the bargaining unit designation of "managerial confidential", they are not

necessarily related.

2. Employees not designated as policy influencing or confidential must have at least one year of service prior to the date of layoff.

(Although Section 75.1(c) indicates five years, this has been modified by negotiated agreement to one year). - This service need not be permanent service to be qualifying for tenure protection under Section 75.1(c).

3. Service must be continuous, that is, there cannot be a break of one or more years.

Only when these criteria are met, and only when the employee is permanent at the time of layoff, can the provision of Section 80-a be applied.

Therefore, employees who meet the criteria, and who are permanent at the time of layoff are afforded retention rights, retreat rights, and if laid off, will have their names placed on a preferred list.

PART III

COMMUNICATIONS AND
PERSONNEL TRANSACTIONS PROCESSING

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PART III

COMMUNICATIONS AND PERSONNEL TRANSACTIONS PROCESSING

Communications...

Between Agency and Department of Civil Service

- As soon as possible, agencies should provide the Department of Civil Service with information on the positions which may be affected by the layoff. This information should include the titles, numbers and locations of the positions to be abolished; other titles, including direct line titles, which may be affected by the bump and/or retreat rights of permanent employees; and titles which may be affected by the

return of employees to encumbered positions.

- Agencies will receive seniority rosters from the Department of Civil Service for all titles which are to be abolished and for all the titles which may be affected by the layoff. The accuracy of the seniority information provided in the rosters should be verified with employees. The Department of Civil Service should be immediately notified in writing of any discrepancies or errors, with an explanation of the change. Appropriate documentation must be provided.
- Two copies of completed Preferred List Eligible Cards (S-295, S-296, S-296.5) for each employee who is

entitled to preferred list status must be forwarded to the Department of Civil Service. Agencies should fill out these cards utilizing the verified seniority information, agency records and information received from employees regarding the geographic locations in which they would accept employment. If the laid off employee has displaced another individual in a lower grade, the title, grade and location of the lower grade position must be noted on the appointment portion of both copies of the cards.

Between Agencies and Employees

Notification letters should be sent by agencies to all affected by the reduction in force.

- Employees who are being laterally reassigned or transferred in lieu of layoff should be notified in writing of the effective date of the transfer or reassignment, the location of the new position, where and when to report to work, and any other pertinent information.
- Employees who are separated from target layoff titles -- Employees in this category who are exercising displacement (bumping or retreat) rights or who are being reverted to

hold items -- should be notified in writing of the effective date of the transaction, the location of the new position, the title to which they are bumping, retreating or reverting, where and when to report to work and any other pertinent information.

- Employees who are being separated from State Service -- A sample notification letter for employees who are being separated from State service has been distributed by the Division of the Budget.

In addition to this notification letter, these employees should be given copies of booklets "Information for Employees Separated from State Service" and "New York State Unemployment Insurance

Information for Claimants."

Further, employees who are being separated from State service and who have accumulated vacation credits exceeding the 30 days for which lump sum payment is made, should be notified that they will be permitted to use excess vacation credits up to the present maximum of 40 days.

Personnel Transaction Processing

The following is a listing of the transaction codes that should be used on Payroll and Personnel Transaction Forms, PR-75, when reductions in force occur:

Group I Transactions

Reinstatement Transactions

Rein LV reinstatement from an

encumbering leave -- use
this code to restore a
probationary employee to
his/her permanent hold
item.

DISPL Dir Displacement (direct) of
an employee from a higher
permanent title to a lower
level title, in a direct
line, in lieu of layoff.

DISP RET Displacement (retreat) of
an employee from a higher
permanent title to the
last lower title
previously held
permanently, which is not
in a direct line, in lieu
of layoff.

Transfer and Reassignment Transactions

REASGN LAY Lateral movement in the same title and grade within an appointing authority (in one payroll agency or across payroll agencies) to avoid layoff prior to the abolition of position taking place.

TR ~~LAYOFF~~ Lateral movement between appointing authorities to the same title and grade to avoid layoff prior to an abolition of positions taking

place.

Note: use this code only for movement between appointing authorities. Movements within an appointing authority are considered reassignment in lieu of layoff (REASGN LAY).

Group II Transactions

Separation Transactions For Use By Losing Payroll Agencies

REASGN OUT	Use to report a separation, as a result of lateral movement between payroll agencies under the same appointing authority in lieu of layoff
------------	--

prior to abolition of
position.

Separation From Service Transactions

LAYOFF Layoff of an employee not
placed after abolition of
position.

LAYOFF

DIR Layoff (direct) of a
permanent employee
displaced by a higher
level employee in the
direct promotion line.

LAYOFF

RET Layoff (retreat) of a
permanent employee
displaced by a higher
level employee not in the
direct promotion line.

TERM Use this code for
 termination of non-
 permanent employees.

For complete information on how to
prepare Forms PR-75, refer to the
Department of Audit and Control Payroll
Manual.

PART IV

INFORMATION FOR EMPLOYEES

A-333

PART IV

INFORMATION FOR EMPLOYEES

The Appendices of these guidelines includes a copy of the booklet "Information for Employees Separated from State Service" which is to be provided to affected employees.

Supplies of that booklet may be obtained from the designated liaison in the Department of Civil Service.

In addition to the information contained in that booklet the following will be helpful to personnel staff in responding to the questions commonly asked by employees prior to the actual layoff.

Which Employees Have "Layoff Rights"
Under Civil Service Law

- Permanent Employees (including those

on probation) in competitive class positions.

- Contingent-permanent employees including those on probation (appointed since December 18, 1980 in competitive class position)
- Permanent employees (including those on probation in labor or non-competitive class positions who have at least one year of service and whose positions are not considered to be confidential or policy influencing.
- Any of the above employees (including those on probation in labor or non-competitive class positions who have at least one year of service and whose positions are not considered to be confidential or

policy influencing.

- Any of the above employees who are on authorized leave with or without pay.

Which employees Do Not Have "Layoff Rights" Under Civil Service Law

- Non-permanent employees (e.g., provisional or temporary employees) in any competitive, non-competitive, non-competitive or Labor class position
- Employees in exempt class positions
- Employees in unclassified service positions
- Permanent employees in non-competitive class or Labor class positions with less than one year of service

- Permanent employees in non-competitive class positions which are considered to be confidential or policy influencing

Of those employees in a title who do have rights, some have greater rights than others.

First, permanent employees who are on probation have less right to be retained than permanent employees in the same title who have completed their probation.

Second, among employees with equal retention status, (e.g., all permanent non-probationers) employees with less seniority have less right to be retained than more senior employees in the same title.

How Do Layoff Rights Apply to Another Job

Although any individual employee's rights may vary depending on the specific layoff situation, generally an employee's rights are as follows:

1. Reassignment - The right to be offered another position in the same title.

When only some positions are abolished in a title, the more senior employees in these positions may be offered an opportunity to take a position held by a less senior employee who will be laid-off. These reassignments may be to another unit or geographic location in the agency. Depending upon the seniority of the employee, the

program needs of the agency, and the number of employees being affected, more senior employees may have several or only one reassignment possibility. Employees who are offered a reassignment in their title, but who refuse it have no further rights under Civil Service Law. However, if the reassignment was to a different county, the Department of Civil Service will allow them preferred list status.

2. Rights to a Lower-Level Position

A) "Bumping" or Vertical

Displacement Competitive class employees who cannot be offered a same title reassignment either because they lack seniority, or because all of

the positions in their title are being abolished may be able to "bump" other less senior employees in direct-line lower-level titles that are not being abolished. For "bumping" to occur the situation must be as follows:

1) The lower-level position must be in a strict promotion direct-line, e.g.

- Principle Clerk, G-11
- Senior Clerk, G-7
- Clerk, G-3

Employees may not "bump" into collateral line titles such as in the above example, from

Principle Clerk to Senior
File Clerk.

- 2) The lower-level title must be occupied, i.e., not abolished simultaneously, or vacant (however, if in the example, the title of Senior Clerk did not exist or all positions were vacant, the Principal Clerk could bump a clerk).
- 3) The bumping employee has greater rights than the employee at the lower-level who has least rights. This means that, for example a probationer cannot "bump" an employee who has completed

probation, and that the bumping employee must have more seniority than the least senior employee.

Note that an employee who has "bumping" rights can only bump the "least" senior lower-level employee, and cannot choose to bump anyone with less seniority. Employees who bump to a lower-level position will go on a preferred list for their former title.

B) Retreat to a Former Title

Non-Competitive and Labor class employees and competitive class employees who are in

titles which have no lower-level direct promotion lines who cannot be offered a reassignment may be able to retreat to the position they last held permanently which is at a lower-level, if that title now exists and is occupied by an employee with less rights. As in "bumping" they can only retreat to the position now held by the least senior employee, and a probationer cannot retreat to a position held by an employee who has completed probation.

As in bumping, retreating employees go on a preferred

list for their former title.

By Civil Service Law all of these rights are limited by the "layoff unit" in which the abolition of the positions is taking place. That is, no employee can be offered a reassignment if title, or a bump or retreat to a position outside their layoff unit. In most cases, the layoff unit is the agency in which they work. However, some agencies are divided into two or more layoff units, usually by county.

Common Questions and Answers about Layoffs

[Q] How is my seniority date calculated?

[A] For layoff, your date of permanent

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appointment in a classified service title and continuous service since that date determine your seniority date, except that veterans get 2 1/2 years, and disabled veterans 5 years added on to their seniority. This service may be broken by periods of less than one year and still be considered continuous. Time on leave or on a preferred list also counts as continuous service.

[Q] If I refuse a reassignment to my title at another location, do I still have rights to bump or retreat to a lower-level position?

[A] No. You will only be offered a reassignment if you have enough seniority to be retained while another employee must be laid-off.

If the reassignment was to a county other than where you now work, you can go on a preferred list.

[Q] Why can't I bump or retreat and take any job below me held by someone with less seniority?

[A] The Civil Service Law specifically states that a "displacing" employee may only take the position held by the least senior employee.

[Q] Can I bump or retreat to a title in another agency?

[A] No. Layoff rights, bumping and retreat take place only within the layoff unit where you are now employed.

[Q] If I'm on probation and have a hold item should I ask to go back to my hold item if I think I might be

laid-off?

[A] As a probationer, you always have a right to be restored to an item you are on leave from, but if you are laid-off you may also have additional rights to reassignment, bumping or retreat. Discuss your situation with your Personnel Officer.

[Q] My agency has asked me to choose to which counties I would accept reassignment, bumping or retreat without my knowing what jobs will eventually be available. Is this legal?

[A] Yes. Rule 5.5(b) of the Civil Service Law allows agencies to make binding agreements with employees on their willingness to accept such

opportunities in advance. Employees who do not indicate their choices will be considered to have declined all opportunities except those that may be available in the county where they now work.

[Q] Can non-permanent employees or less senior employees keep their jobs in other titles, while permanent employees in my title are reassigned or laid-off?

[A] Yes. Besides being limited to a layoff unit, layoffs are also limited to titles that have been specifically identified for reductions. If a title is not targetted for reductions, employees in that title are not affected.

[Q] If I refuse a reassignment or lower

level position, will I be able to collect Unemployment Benefits?

[A] The fact that you refused will probably not in itself affect your eligibility for unemployment benefits, it will be the reasons for your refusal that will count. You should discuss this with a representative in your local Employment Service office.

[Q] Where can I get more information about my layoff rights?

[A] The first place to go is your personnel office. You can also call the Department of Civil Service and ask to speak to the Staffing Services Section responsible for your agency, if the information you need concerns a situation specific

to your agency. The Department of Civil Service also has a toll free number 1-800-457-2973 for general layoff information.

[Q] If I am laid-off when will I know and what other information will I be given?

[A] If you are laid-off you will be sent a written notice at least three weeks before the date of layoff. You will also be provided with information on preferred lists and the effect of layoff on your health insurance, retirement, union insurance, etc. in booklet Information for Employees Separated from State Service.

[Q] If I accept a reassignment or bumping or retreat when will I go to

my new job?

[A] In most layoff situations, all reassignments, bumping, retreetat or layoffs occur on a specified date called the "date of layoff".

[Q] If I accept a reassignment in another location but after working there I decide I made a mistake and I resign, can I go on a preferred list?

[A] No. After the date of layoff, any employee who resigns will not be given preferred list rights for the title they have resigned from. Employees should chose carefully and make realistic decisions on locations where they will accept a job.

PART V

PREFERRED LIST ADMINISTRATION

PART V

PREFERRED LIST ADMINISTRATION

This Section will be transmitted at a later date.

PART VI
SYNOPSIS OF RELEVANT DETERMINATIONS

This Section will be transmitted at a
later date.

PART VII
APPENDICIES

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(EEOC letterhead)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1501
NEW YORK, NEW YORK 10007
(212) 264-7188

May 19, 1986

Mr. George F. Kleinmann
749 New Scotland Avenue
Albany, New York 12208

Dear Mr. Kleinmann:

The Commissioners in Washington
voted against intervention by the EEOC in
your case.

The file has not yet been returned
here, so I am unable to explain the
reasons for the adverse decision.

Please accept my best wishes for
success of your endeavors.

Very truly yours,

/s/ Ann Thacher Anderson
Ann Thacher Anderson
Senior Trial Attorney

ATA:sw

UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF NEW YORK

GEORGE KLEINMANN,

Plaintiff,

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Applicant For
Intervention,

85 CV 519
(Judge
Miner)

vs.

MOTION FOR
LEAVE TO
INTERVENE
AS
PLAINTIFF

MARIO CUOMO, as Governor of
the State of New York, THE
STATE OF NEW YORK and ARTHUR
Y. WEBB, as Commissioner of
the New York State Office of
Mental Retardation and
Developmental Disabilities,

Defendants.

Pursuant to Rule 24(b) of the
Federal Rules of Civil Procedure, the
Equal Employment Opportunity Commission
("EEOC"), by its undersigned attorneys,
respectfully moves the Court for leave to

intervene as plaintiff in this action. In support of its motion, the Commission alleges:

1. This action includes claims under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Sec. 621 et. seq. ("ADEA").

2. The EEOC is an agency of the United States of America charged with the administration and enforcement of the ADEA. See Sections 6, 7, 8 and 9 of the ADEA, 29 U.S.C. Secs. 625, 626, 627 and 628, as amended by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, and by Public Law 98-532 (1984), 98 Stat 2705.

3. The EEOC is expressly authorized to bring lawsuits on behalf of aggrieved individuals or in the public interest by

Section 7(b) of the ADEA, 29 U.S.C. Sec. 626(b), which incorporates by reference Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Secs. 216(c) and 217.

4. This action was brought by an aggrieved individual on his own behalf. Under Rule 24(b), Fed. R. Civ. P., intervention may be permitted when an applicant's claim and the main action have a question of law or fact in common. The rule also provides that when a party to the action relies upon a statute administered by a federal agency, the agency upon timely application may be permitted to intervene.

5. If the EEOC is permitted to intervene as a plaintiff, its complaint would present material facts and

questions of law already at issue in the pleadings filed to date insofar as those pleadings treat the ADEA. The EEOC does not seek intervention as to issues extraneous to the ADEA.

6. Participation by the EEOC will neither prejudice the interests of the original parties nor result in any delay of proceedings. The EEOC as plaintiff offers this Court expertise acquired through enforcement of the ADEA, and hopes to help the parties in resolving the underlying dispute.

WHEREFORE the EEOC respectfully asks the Court to grant its motion for leave to intervene as a plaintiff. A proposed Complaint and a supporting Memorandum of

Law accompany this motion.

Dated: New York, N.Y. 1985

Respectfully Submitted,

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

JOHNNY J. BUTLER
Acting General Counsel

ROBERT L. WILLIAMS
Regional Attorney

ANN THACHER ANDERSON
Senior Trial Attorney

(EEOC letterhead)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1501
NEW YORK, NEW YORK 10007
(212)264-7188

October 19, 1987

Melissa J. Smallacombe, Esq.
Roemer and Featherstonhaugh, P.C.
Capital Center
99 Pine Street
Albany, New York 12207-2734

Re: Freedom of Information Act
Request No. 87-04-FOIA-101-NY
87-07-FOIA-172-NY

Dear Ms. Smallacombe:

This is in response to your request
for access to the Equal Employment
Opportunity Commission file Kleinman,
Edward v. Office of Mental Retardation &
Developmental Disabilities, Charge No.
023-84-0469, under the Freedom of
Information Act.

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Your request is granted with the following exceptions. Access to all the Investigator's notes and memoranda, Attorney's notes, the log of Investigative/settlement actions, is denied pursuant to the Freedom of Information Act 5 U.S.C. Sec. 552(b)(5).

The fifth exemption provides that an agency may withhold records which are:

(5) inter-agency or intra-agency memorandums or letters which would not be available bylaw to a party other than an agency in litigation with the agency.

This exemption covers internal communications within the executive branch of the government to the extent that they are deliberative.

Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975);

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NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975). The exemption is designed to protect the decision-making processes of government agencies, and permits an agency to withhold information if it was prepared prior to an agency's decision and for the purpose of assisting the agency decision maker. Montrose Chemical Corp. v Train, 491 F.2d 63 (D.C. Cir. 1974). The documents listed above fall within this exemption since they are crucial to the Commission's deliberative process.

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Documents to which access is granted are enclosed. Please mail a check made out to the U.S. Department of Treasury in the amount of \$48.20. Mail to the

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attention of Ms. S. Washington, the above address. Payment will cover costs incurred in handling your request. See 29 CFR 1610.15.

If you wish to appeal the partial denial of your request, you may do so within 30 days after receipt of this letter by writing to the Chairman, Equal Employment Opportunity Commission, 2401 "E" Street, N.W., Washington, D.C. 20507. You must attach this letter to your appeal letter. Your appeal would be governed by the provisions of 29 C.F.R. Sec. 1610.11.

Sincerely,

Robert L. Williams
Regional Attorney

RLW: JB/sw

NEW YORK STATE CIVIL SERVICE LAW

SECTION 80

§80. SUSPENSION OR DEMOTION UPON THE
ABOLITION OR REDUCTION OF
POSITIONS

1. Suspension or demotion. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such

abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that the date of original appointment of any such incumbent who was transferred to such governmental jurisdiction from another governmental jurisdiction upon the transfer of functions shall be the date of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction from which such transfer was made. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the competitive class, incumbents hold the same or similar positions who have not completed their probationary service

shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.

1-a. Notwithstanding the provisions of subdivision one of this section, the members of a police or paid fire department in the city of Buffalo shall be subject to the following procedure. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the

inverse order of original appointment on a permanent basis in the grade or title in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the competitive class, incumbents holding the same or similar positions who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.

1-b. Notwithstanding the provisions of subdivision one of this section, employees of secure detention facilities in the city of New York and of the alternatives to secure detention facilities program in such city who are performing functions which were assumed by the department of social services in the city of New York on the tenth day of November, nineteen hundred seventy-one and who, upon such assumption were transferred to said department, shall be subject to the following procedure. Where, because of economy, consolidation or abolition of function, curtailment of activities or otherwise, positions in the competitive class are abolished, or reduced in rank or salary grade, suspension or demotion, as the case may

be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that if any person so employed and so transferred was employed on a permanent basis in such a facility or such program prior to the thirtieth day of December, nineteen hundred sixty-seven, for purposes of this subdivision regarding priority of retention and for no other purpose, the date of original appointment of any such person shall be deemed to be

the date such permanent employment commenced prior to the said thirtieth day of December, nineteen hundred sixty-seven.

2. Continuous service. Except as otherwise provided herein, for the purposes of this section the original appointment of an incumbent shall mean the date of his first appointment on a permanent basis in the classified service followed by continuous service in the classified service on a permanent basis up to the time of the abolition or reduction of the competitive class positions. An employee who has resigned and who has been reinstated or reappointed in the service within one year thereafter shall, for the purposes of this section, be deemed to have

continuous service. An employee who has been terminated because of a disability resulting from occupational injury or disease as defined in the workmen's compensation law and who has been reinstated or reappointed in the service thereafter shall be deemed to have continuous service. A period of employment on a temporary or provisional basis, or in the unclassified service, immediately preceded and followed by permanent service in the classified service, shall not constitute an interruption of continuous service for the purposes of this section; nor shall a period of leave of absence without pay pursuant to law or the rules of the civil service commission having jurisdiction, or any period during which an employee is

suspended from his position pursuant to this section, constitute an interruption of continuous service for the purposes of this section.

3. Interrupted service. A state employee who has resigned and who has been reinstated or reappointed in the service more than one year thereafter shall be credited with any previous state service rendered prior to his or her resignation to which he or she would have been entitled for the purposes of this section but for such resignation; provided, however, that any time out of the service exceeding three years shall be subtracted from the employee's previous state service. In such instances, continuous service shall be deemed to have begun on the date which

precedes the otherwise applicable date for the commencement of continuous service by the period of actual creditable service provided by this subdivision.

4. Units for suspension or demotion in civil divisions. Upon the abolition or reduction of positions in the service of a civil division, suspension or demotion shall be made from among employees holding the same or similar positions in the entire department or agency within which such abolition or reduction of position occurs. In a city having a population of one million or more, the municipal civil service commission may, by rule, designate as separate units for suspension and demotion under the

provisions of this section any hospital or institution or any division of any department or agency under its jurisdiction. Upon the abolition or reduction of positions in such service, suspension or demotion, as the case may be, shall be made from among employees holding the same or similar positions in the department wherein such abolition or reduction occurs, except that where such abolition or reduction occurs in such hospital or institution or division of a department designated as a separate unit for suspension or demotion, suspension or demotion shall be made from among incumbents holding the same or similar positions in such separate unit.

4-a. For purposes of determining units for suspension or demotion in the city of Niagara Falls, the following

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three units shall be deemed to constitute departments within the meaning of subdivision three above: (i) members of the police department employed as auxiliary policewomen, police officers, police dispatchers or communications technicians, police lieutenants, chief communications officer, or police captains; (ii) members of the fire department employed as firefighters, fire alarm operators, fire captains, battalion fire chiefs or master mechanic-chief of apparatus; and (iii) all other employees of the city of Niagara Falls, in the competitive class.

5. Units for suspension or demotion in the state service. The president may, by regulation, designate as separate units for suspension or

demotion under the provisions of this section any state hospital, institution or facility or any division of any state department or agency or specified hospitals, institutions and facilities of a single state department or agency within a particular geographic area as determined by the president. Upon the abolition or reduction of positions in the state service, suspension or demotion, as the case may be, shall be made from among employees holding the same or similar positions in the department wherein such abolition or reduction occurs, except that where such abolition or reduction occurs in a separate unit for suspension or demotion designated by regulation of the president, suspension or demotion shall

be made from among incumbents holding the same or similar positions in such separate unit.

6. Displacement in civil divisions. A permanent incumbent of a position in a civil division in a specific title to which there is a direct line of promotion who is suspended or displaced pursuant to this section, together with all other such incumbents suspended or displaced at the same time, shall displace, in the inverse order of the order of suspension or demotion prescribed in subdivisions one and two of this section, incumbents serving in positions in the same lay-off unit in the next lower occupied title in direct line of promotion who shall be displaced in the order of suspension or demotion

prescribed in subdivisions one and two of this section; provided, however, that no incumbent shall displace any other incumbent having greater retention standing. If a permanent incumbent of a position in a civil division is suspended or displaced from a position in a title for which there are no lower level occupied positions in the direct line of promotion, he shall displace the incumbent with the least retention right pursuant to subdivisions one and two of this section who is serving in a position in the title in which the displacing incumbent last served on a permanent basis prior to service in one or more positions in the title from which he is suspended or displaced, if: (1) the service of the displacing incumbent while

in such former title was satisfactory and (2) the position of the junior incumbent is in (a) the competitive class, (b) the layoff unit from which the displacing incumbent was suspended or displaced, and (c) a lower salary grade than the position from which the displacing incumbent is suspended or displaced; provided, however, that no incumbent shall displace any other incumbent having greater retention standing. Refusal of appointment to a position afforded by this subdivision constitutes waiver of rights under this subdivision with respect to the suspension or displacement on account of which the refused appointment is afforded. The municipal civil service commission shall promulgate rules to implement this subdivision

including rules which may provide adjunctive opportunities for displacement either to positions in direct line of promotion or to formerly held positions; provided, however, that no such rule shall permit an incumbent to displace any other incumbent having greater retention standing. For the purpose of acquiring preferred list rights, displacement pursuant to this subdivision is the equivalent of suspension or demotion pursuant to subdivision one of this section.

7. Displacement in the state service. A permanent incumbent of a position in the state service in a specific title to which there is a direct line of promotion who is suspended or displaced pursuant to this section,

together with all other such incumbents suspended or displaced at the same time, shall displace, in the inverse order of the order of suspension or demotion prescribed in subdivisions one and two of this section, incumbents serving in positions in the same layoff unit in the next lower occupied title in direct line of promotion who shall be displaced in the order of suspension or demotion prescribed in subdivisions one and two of this section; provided, however, that no incumbent shall displace any other incumbent having greater retention standing. If a permanent incumbent of a position in the state service is suspended or displaced from a position in a title for which there are no lower level occupied positions in direct line

of promotion, he shall displace the incumbent with the least retention right pursuant to subdivisions one and two of this section who is serving in a position in the title in which the displacing incumbent last served on a permanent basis prior to service in one or more positions in the title from which he is suspended or displace, if: (1) the service of the displacing incumbent while in such former title was satisfactory and (2) the position of the junior incumbent is in (a) the competitive class, (b) the layoff unit from which the displacing incumbent was suspended or displaced, and (c) a lower salary grade than the position from which the displacing incumbent is suspended or displaced; provided, however, that no incumbent

shall displace any other incumbent having greater retention standing. Refusal of appointment to a position afforded by this subdivision constitutes waiver of rights under this subdivision with respect to the suspension or displacement on account of which the refused appointment is afforded. The state civil service commission shall promulgate rules to implement this subdivision including rules which may provide adjunctive opportunities for displacement either to positions in direct line of promotion or to formerly held positions; provided, however, that no such rules shall permit an incumbent to displace any other incumbent having greater retention standing. For the purpose of acquiring preferred list rights, displacement

pursuant to this subdivision is the equivalent of suspension or demotion pursuant to subdivision one of this section.

8. Certain suspensions in cities of one million or more for reasons of economy. Notwithstanding the provisions of any other general or local law, administrative code or ordinance, in cities having a population of one million or more, any member employed in the uniformed or non-uniformed services of such city who was suspended on or after July first, nineteen hundred seventy-five, because of economy measures taken by such city, and who returns to such service, shall be deemed to have been in continuous service in determining seniority and length of service

regardless of the duration of such suspension; provided, however, that for retirement purposes, a member receiving such service credit shall pay into the annuity savings fund of the retirement system the amount of the employee contributions required to have been paid into the retirement system for such service, within one year after this subdivision shall have taken effect. For the purposes of this subdivision "uniformed services" shall mean and include any uniformed force or service the members of which are paid in whole or part by such city.

9. Certain suspensions or demotions in the city of Niagara Falls. Notwithstanding the provisions of subdivision one of this section, the

members of a paid fire department in the city of Niagara Falls shall be subject to the following procedure. Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the grade or title in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter. Notwithstanding the provisions of this subdivision, however,

upon the abolition or reduction of positions in the competitive class, incumbents holding the same or similar positions who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents.